

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. The 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.

Appellant

Patricia Shaver

Appellant's Counsel

Carl D. "Todd" Campbell, III
F. Gerald Maples, P.A.
365 Canal Street, Suite 2650
New Orleans, Louisiana 70130

Appellee

Frankie Blackwell

Appellee's Counsel

Melinda O. Johnson
Allen, Cobb, Hood & Atkinson, P.A.
2512 25th Avenue
Post Office Drawer 4108
Gulfport, Mississippi 39502



Carl D. "Todd" Campbell, III
Attorney of Record for Appellant

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STATEMENT OF ISSUE

- 1) Whether the trial court erred in dismissing Plaintiff's claims for failure to serve process based on Mississippi Rule of Civil Procedure 4(h) where the defendant, following Hurricane Katrina, moved, married, changed her name, and ultimately was found residing in Colorado.

STATEMENT OF THE CASE

This case arises from an automobile accident that occurred on 21 July 2004. Plaintiff timely filed suit against Defendant on 6 July 2007. Upon filing suit, Plaintiff diligently attempted to ascertain Defendant's whereabouts. Unable to locate Defendant, on 14 November 2007, 131 days after filing suit, Plaintiff sought an extension of time of sixty days within which to effectuate service of process, which relief was granted on 15 November 2007. During the course of that extension, Plaintiff located the Defendant who had married, changed her last name and moved to Colorado. Plaintiff, in need of additional time to perfect service, requested and the court granted an additional ten days on 18 January 2008. Defendant was served on 20 January 2008, within the ten day extension of time granted by the trial court. Thereafter, Defendant answered and took steps to participate in litigation by propounding interrogatories and requests for production on Plaintiff.

On 19 March 2008, Defendant filed a motion to dismiss, or in the alternative, a motion for summary judgment, asserting that Plaintiff failed to timely serve her complaint against Defendant within the time limit provided by Mississippi Rules of Civil Procedure 4(h). On 8 January 2009, the trial court granted Defendant's motion, granting summary judgment in favor of Defendant and dismissing Plaintiff's claims against Defendant. Plaintiff subsequently filed the instant appeal, asserting that the trial court erred in its ruling.

SUMMARY OF ARGUMENT

The trial court erred in dismissing Plaintiff's claims against Defendant Frankie Blackwell for two reasons. First, Plaintiff's diligent efforts to locate and serve Defendant, who had moved across the country and changed her last name, constitute a finding of "good cause." Second, and alternatively, Defendant waived her claim of insufficient process by actively participating in the litigation.

ARGUMENT

A. PLAINTIFF DEMONSTRATED "GOOD CAUSE."

The trial court erred in granting summary judgment in favor of Defendant because Plaintiff demonstrated good cause for failure to serve process within 120 days of filing the complaint. Mississippi Rule of Civil Procedure 4(h) requires dismissal of a claim if service is not perfected upon a defendant within 120 days of filing the complaint unless plaintiff can show "good cause why such service was not made within that period."

In reviewing the trial court's grant of a motion to dismiss or a motion for summary judgment, the standard of review is *de novo*. *Burleson v. Lathem*, 968 So.2d 930, 932 (Miss. 2007) (citing *Scaggs v. GPCH-GP, Inc.*, 931 So. 1274, 1275 (Miss. 2006); *Park on Lakeland Drive, Inc. v. Spence*, 941 So.2d 203, 206 (Miss. 2006); *McLendon v. State*, 945 So.2d 372, 382 (Miss. 2006); *Monsanto Co. v. Hall*, 912 So.2d 134, 136 (Miss. 2005)). A trial court's determination of "good cause" is a discretionary ruling, entitled to deferential review of whether the trial court abused its discretion and whether there was substantial evidence supporting the determination. *Long v. Memorial Hosp. at Gulfport*, 969 So.2d 35, 38 (Miss. 2007). However, where the trial court's judgment involves the interpretation of legal principles, the standard of review is *de novo*, requiring a plenary review of its interpretation. *Id.*

In order to establish good cause for late service, a plaintiff must have been diligent in its efforts to effect service. *Foss v. Williams*, 993 So.2d 378, 379 (Miss. 2008) (citing *Montgomery v. SmithKline Beecham Corp.*, 910 So.2d 541, 546 (Miss. 2005)). 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)). In the case *sub judice*, Plaintiff was diligent and faced understandable mitigating circumstances. Plaintiff diligently attempted to locate Defendant and moved the court for extensions of time in which to perfect service. Defendant, meanwhile, had married, changed her last name and moved to Colorado, circumstances which understandably presented challenges to Plaintiff's diligent search.

In *Fortenberry v. Memorial Hospital at Gulfport*, plaintiff filed his complaint against four defendants on May 21, 1991. 676 So.2d 252, 253 (Miss. 1996). He was unable to locate one of the defendants, Dr. Mitchell. *Id.* at 254. Plaintiff requested and received two grants of additional time, the latter of which expired November 25, 1991. *Id.* He then wrote a letter to the Court, explaining his inability to locate Dr. Mitchell and advising that he would approach the Court once he found the defendant. *Id.* Dr. Mitchell had moved. *Id.* The Harrison County Circuit Court, Judge Jerry O. Terry, granted defendant's motion to dismiss. *Id.* at 252. The Supreme Court reversed the trial court decision, holding that the trial judge had erred when dismissing Dr. Mitchell. *Id.* at 256. The Supreme Court found good cause "because of the extensive efforts to locate and serve Dr. Mitchell." *Id.* Specifically, the Court stated that "Dr.

Mitchell was difficult to locate and serve with process because he had moved from the Gulf Coast area to Oxford,” though remaining within the state of Mississippi. *Id.*

In *Jenkins v. Oswald*, the Mississippi Supreme Court upheld the trial court’s denial of defendant’s motion to dismiss, despite the fact that plaintiff had never filed for an extension of time and five years had passed between the filing of the complaint and service of process. 3 So. 3d 746 (Miss. 2009). After unsuccessfully attempting to serve defendant, plaintiff’s only efforts to locate defendant involved “Google” searches via the Internet. *Id.* at 748. Plaintiff was eventually able to track down defendant after fortuitously seeing him in a local television commercial. *Id.* The defendant had also moved out of state. *Id.* The trial court denied defendant’s motion to dismiss stating that the delay was acceptable considering plaintiff had exercised reasonable diligence. *Id.* at 749. The Supreme Court of Mississippi affirmed the ruling. *Id.* at 751.

In *Foss v. Williams*, plaintiff filed a complaint on 19 July 2006. 993 So. 2d 378, 378 (Miss. 2008). All defendants named in the complaint were served within 120 days, with the exception of Dr. Foss, who was served on the 121st day. *Id.* at 379. Dr. Foss filed a motion to dismiss. *Id.* The trial court denied the motion to dismiss, finding that the plaintiff had demonstrated good cause. *Id.* Plaintiff believed that associated local counsel was responsible for service. *Id.* That attorney failed to initiate service. *Id.* Plaintiff’s counsel only learned of this failure 118 days after the complaint was filed. *Id.* He immediately sought to have defendant served. *Id.* The court held that this demonstrated good cause and the Supreme Court agreed. *Id.* at 380.

In *Bennett v. McCaffrey*, plaintiff filed a complaint on 7 January 2003. 937 So.2d 11, 12 (Miss. 2006). Plaintiff then requested and was granted an additional 60 days. *Id.* at 12-13. Once she received pertinent information from her insurance company concerning defendant’s

whereabouts, she sought additional time to serve. *Id. at 16*. Even though defendant allowed 92 days to elapse after the expiration of her first extension before she requested her second extension, the Supreme Court stated that her “actions firmly established good cause for the delay in service.” *Id. at 17*.

In each of the four cases discussed above, plaintiffs were found to have demonstrated good cause when two extensions had expired but the defendant had moved from the Gulf Coast to Oxford (though remaining in Mississippi), making it very difficult for plaintiff to locate defendant (*See Fortenberry*, 676 So.2d at 256); when they never applied for additional time in which to serve process and five years passed between filing the complaint and perfecting service (*See Jenkins*, 3 So.3d at 749); when two attorneys working on a case failed to communicate with one another regarding whose responsibility it was to serve the defendant, resulting in a mad scramble to effectuate service after 118 days passed from the filing of the complaint (*See Foss*, 993 So.2d at 379); and finally, when they waited 92 days after their first extension had expired before requesting their second extension (*See Bennett*, 937 So.2d at 17).

Plaintiff's failure to effectuate service within 120 days, in this case, is far more understandable than the plaintiffs' failures discussed *supra*. Like the defendant in *Fortenberry* who moved from the Gulf Coast to Oxford, the defendant in this case moved all the way from Mississippi to Colorado and changed her last name. And, whereas the plaintiff in *Fortenberry* allowed two extensions of time to expire without requesting a third extension of time, Plaintiff Patricia Shaver requested a second extension of time, which was granted, and service was ultimately obtained within this second extension. Unlike the plaintiff in *Jenkins* who never requested additional time and allowed five years to pass before perfecting service, the plaintiff here requested and received additional time in which to serve within 131 days and Plaintiff perfected service (in Colorado) within 200 days. While there was a period of eleven days in

which Plaintiff technically was not operating under an extension, in *Bennett*, the plaintiff allowed 92 days to elapse upon expiration of their first extension before requesting their second extension and the court found that good cause existed.

For these reasons, Plaintiff in the case *sub judice* was more diligent than the plaintiffs discussed above, all of whom were held to have demonstrated good cause for their failure to timely effect service. Namely, Plaintiff requested and was granted additional time, Defendant married and changed her last name, and Defendant moved from Mississippi to Colorado. Despite the mitigating circumstances making it very difficult for Plaintiff to locate Defendant, Plaintiff's diligence and persistence eventually resulted in service of process upon Defendant while Plaintiff was operating under an extension of time granted by the Court.

**B. DEFENDANT WAIVED HER OBJECTION TO INSUFFICIENCY OF PROCESS
BY PARTICIPATING IN LITIGATION.**

Alternatively, the trial court erred in dismissing Plaintiff's claims because Defendant's participation in the litigation constitutes a waiver of objections to insufficiency of process. In *East Mississippi State Hospital v. Adams*, the Supreme Court affirmed the trial court's denial of defendants' motion to dismiss, holding that defendants had waived their objections to insufficiency of process by participating in litigation. 947 So.2d 887 (Miss. 2007). In large part, the participation in the litigation there involved participating in discovery in the form of interrogatories and production requests. The defendants there literally complied with Rule 12(h) in that they "properly and timely raised the defenses of insufficiency of process and insufficient service of process in their answer." However, the court held that their subsequent participation in the litigation was a waiver of those defenses.


Here, after making a special appearance to request additional time to respond to the complaint and filing her motion to dismiss, Defendant answered and propounded interrogatories

and requests for production of documents (which Plaintiff answered). This active participation in the litigation of this case constitutes Defendant's waiver of objections to insufficiency of process.

CONCLUSION

Plaintiff demonstrated good cause for failure to timely serve defendant. Alternatively, Defendant waived any objection to insufficiency of process by participating in the litigation of this case. As such, the trial court's order granting Defendant's motion for summary judgment, thereby dismissing Plaintiff's claims, should be reversed. Thus, Plaintiff requests that this court reverse the trial court's decision granting Frankie Blackwell's Motion to Dismiss or, in the alternative, Motion for Summary Judgment and remand the case to the trial court for further proceedings.


Respectfully submitted,


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

ATTORNEY FOR THE APPELLANT
PATRICIA SHAVER

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed, in the above-captioned matter, the Brief of the Appellants on this 21st day of July, 2009, 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 a copy of this brief was sent to opposing counsel via U.S. Mail, postage prepaid, as well as by facsimile.



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

ATTORNEY FOR THE APPELLANT
PATRICIA SHAVER

IN THE SUPREME COURT OF MISSISSIPPI

**PATRICIA SHAVER,
APPELLANT-PLAINTIFF**

CASE NO. 2009-CA-00174

VERSUS

**FRANKIE BLACKWELL,
APPELLEE-DEFENDANT**

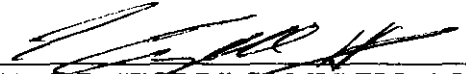
**APPEAL FROM THE CIRCUIT COURT OF
HANCOCK COUNTY, MISSISSIPPI
HONORABLE JERRY O. TERRY, CIRCUIT COURT JUDGE**

**AMENDED AND SUPPLEMENTAL CERTIFICATE OF FILING AND SERVICE FOR
BRIEF OF APPELLANT**

I hereby certify that I filed, in the above-captioned matter, the Brief of the Appellants on this 21st day of July, 2009, 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 a copy of this brief was sent to opposing counsel via U.S. Mail, postage prepaid, as well as by facsimile. I further certify that a copy of the Brief of the Appellants has been sent to the Honorable Jerry O. Terry, Circuit Court Judge via Federal Express, postage prepaid, as well as by facsimile.

This supplemental certificate of service has been sent this 27th day of July, 2009 to the Clerk of the Mississippi Supreme Court and the Honorable Jerry O. Terry via Federal Express postage paid and to all counsel of record via first class mail postage prepaid.

Done this 27th July, 2009.



CARL D. "TODD" CAMPBELL, III
F. GERALD MAPLES, P.A.
365 CANAL STREET, SUITE 2600
NEW ORLEANS, LOUISIANA 70130

ATTORNEYS FOR THE APPELLANT
PATRICIA SHAVER