

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TROY LUNDQUIST, et al**

**APPELLANTS**

**VS.**

**NO. 2010-CA-00597**

**TODD CONSTRUCTION, LLC**

**APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT OF  
MONROE COUNTY, MISSISSIPPI**

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**BRIEF FOR APPELLEE**

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**ORAL ARGUMENT IS NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

**Interested Persons**

**Connection or Interest**

Troy Lundquist

Plaintiff/Appellant

Jennifer Lundquist

Plaintiff/Appellant

T.K. Moffett, Esq.

Attorney for Plaintiffs/Appellants

Todd Construction, LLC

Defendant/Appellee

Chris Todd

Defendant

Bo R. Brock

Attorney for Defendant/Appellee Todd Construction, LLC and Defendant Chris Todd

Mississippi Gravel Sales, LLC

Defendant

J. Joshua Stevens, Jr., Esq.

Attorney for Defendant Mississippi Gravel Sales, LLC and Defendant Chris Todd

Ronald Denley

Defendant

Goodloe T. Lewis, Esq.

Attorney for Defendant Ronald Denley

Honorable Thomas J. Gardner, III

Monroe County Circuit Court Judge

RESPECTFULLY SUBMITTED, this the 25<sup>th</sup> day of January, 2011.

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
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**APPELLANTS**

**VS.**

**NO. 2010-CA-00597**

**TODD CONSTRUCTION, LLC**

**APPELLEE**

**STATEMENT OF ISSUES**

This appeal from the Order Granting Motion to Dismiss of Defendant Todd Construction, LLC, entered by the Circuit Court of Monroe County, Mississippi on March 8, 2010, (Appellant's R.E. p. 13, R. p. 509), presents the following issues for appeal:

Did the trial court err in dismissing Plaintiffs' First Amended Complaint with prejudice as to Defendant Todd Construction, LLC where:

- (1) Plaintiffs failed to properly serve process on Todd Construction, LLC within the one-hundred twenty (120) days as prescribed by Rule 4(h) of the Mississippi Rules of Civil Procedure,
- (2) Plaintiffs failed to show good cause for their failure to properly serve Todd Construction, LLC, and where
- (3) the applicable statute of limitations, as governed by Miss. Code Ann. § 15-1-49(1) (1972, as amended), had expired at the time of said dismissal.

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**NO. 2010-CA-00597**

**TODD CONSTRUCTION, LLC**

**APPELLEE**

**STATEMENT OF THE CASE**

**(1) Nature of Case, Course of Proceedings, and Disposition Below:**

In the interests of brevity, Defendant/Appellee Todd Construction, LLC (hereinafter referred to as "Todd Construction") agrees with and accepts the majority of the Statement of the Case as represented by Plaintiffs. However, pursuant to Rule 28(b) of the Rules of Appellate Procedure, Todd Construction clarifies it's dissatisfaction with Plaintiffs' Statement of the Case below.

Any engagement in discovery or settlement negotiations took place solely on the part of actual parties to the lawsuit at that particular time, which did not include Todd Construction, as Todd Construction's first appearance in this matter was its special appearance made in its Motion to Dismiss of Defendant Todd Construction, LLC. (Appellee R.E. at 1-16, R. at 142-157). Although Plaintiffs state that the existence of Todd Construction was revealed through discovery, the existence of Todd Construction was actually revealed in the sixth defense of the Separate Answer of Christopher Cole Todd, Individually and d/b/a/ Mississippi Gravel Sale, LLC, which was filed on September 12, 2006. (Appellee R.E. at 17-21, R. at 23-27).

**(2) Statement of Facts:**

Again, in the interests of brevity, Todd Construction agrees with and accepts the majority of the Statement of the Case as represented by Plaintiffs. However, pursuant to Rule 28(b) of the



Rules of Appellate Procedure, Todd Construction further clarifies it's dissatisfaction with Plaintiffs' Statement of the Case below.

As opposed to Plaintiffs' statement that "Chris Todd *is* Mississippi Gravel Sales and Todd Construction," (Appellants' Brief at 5) Chris Todd is simply "an employee, officer and part owner of Mississippi Gravel Sales, LLC and Todd Construction, LLC." (Appellee R.E. at 17-21, R. at 23-27). Contrary to Plaintiffs' beliefs, Chris Todd did not respond on behalf of Todd Construction simply mentioned it's name in two of his affirmative defenses. It is clear from the title alone, Defendant Christopher Cole Todd, Individually's, Answer and Affirmative Defenses to First Amended Complaint, that Chris Todd was answering the First Amended Complaint in his individual defendant capacity. (Appellant R.E. at 53, R. at 118).

In addition to Plaintiffs' Statement of the Case, it should be noted that the three (3) year statute of limitation, including the 120-day tolling period, expired on or about August 27, 2009. Plaintiffs made no attempt to have summons issued for the newly added defendant, Todd Construction, within the Rule 4(h) 120 day period. In fact, Plaintiffs' first attempt to have summons issued for Todd Construction came after the September 3, 2009 filing of Todd Construction's Motion to Dismiss, on or about October 26, 2009. (Appellant R.E. at 64, R. at 465).

This first issuance of said summons came just days short of a full year after Plaintiffs filed their First Amended Complaint adding Todd Construction as a Defendant, and well after the expiration of the applicable statute of limitations. Needless to say, Todd Construction was not properly served with process within the time allowed by Rule 4(h) of the Mississippi Rules of Civil Procedure, and Plaintiffs are unable to show any diligence in attempting to properly serve same.

### **SUMMARY OF THE ARGUMENT**

After considering the facts and arguments of counsel, The Circuit Court of Monroe County, Mississippi ruled, within it's discretion, that Plaintiffs did not show good cause for their failure to serve Todd Construction within the required 120 day period, and thereby dismissed Plaintiffs' First Amended Complaint as to Todd Construction. (Appellant R.E. at 13, R. at 509).

In short, Rule 4(h) of the Mississippi Rules of Civil Procedure states that a plaintiff must serve a defendant with the summons and complaint within 120 days of the filing of said complaint, or show good cause for his/her failure to do so, otherwise, said complaint shall be dismissed. Miss. R. Civ. P. 4(h). In the case at hand, Plaintiffs failed to have summons issued within the required 120 day period, much less served within same. In fact, said summons was not issued until after the current Motion to Dismiss was filed, which was almost a full year after their First Amended Complaint was filed.

Plaintiffs have shown no good cause for said failure to properly serve Todd Construction. Plaintiffs do not attempt to show excusable neglect in their failure to serve Todd Construction. Instead, Plaintiffs would have this Court believe that they have obtained some type of implied service of process on Todd Construction, or at least shown good cause for failure to properly serve same, simply by being diligent in serving other defendants, by corresponding on occasion with undersigned counsel, and by the fact that Todd Construction was mentioned in the affirmative defenses of a separate party defendant. However, Plaintiffs have shown no authority in this regard. In fact, Plaintiffs' position is directly contrary to the holding in *Lucas, Holmes* and other case law cited below by Todd Construction.

Also, the three (3) year applicable statute of limitations for this action, governed by Mississippi Code Annotated § 15-1-49(1), had expired at the time of the Circuit Court's

dismissal of this matter as to Todd Construction. Therefore, Plaintiffs can no longer re-file their complaint prior to the expiration of said statute of limitation, and they cannot show good cause for failing to serve process on Todd Construction. Therefore, the Circuit Court's decision to dismiss this matter with prejudice as to Todd Construction was based on substantial evidence supporting same and should be affirmed.

## **ARGUMENT**

### **A. Standard of Review.**

When reviewing a trial court's grant or denial of a motion to dismiss, this Court generally applies a *de novo* standard of review. *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 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). "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Scaggs*, 931 So. 2d at 1275 (citing *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1236 (Miss. 1999)).

However, a trial court's finding of fact on the existence of good cause for the delay in service of process has been deemed "a discretionary ruling ... and entitled to deferential review" on appeal. *Rains v. Gardner*, 731 So. 2d 1192, 1197-98 (Miss. 1999). This Court has stated that when reviewing fact-based findings, it will only examine "whether the trial court abused its discretion and whether there was substantial evidence supporting the determination." *Id.* at 1197. However, a decision to grant or deny an extension of time based upon a question of law will be reviewed *de novo*. *Id.* at 1198.

**B. The Circuit Court did not err by dismissing the Plaintiffs' First Amended Complaint as to Defendant Todd Construction, LLC with Prejudice.**

1. Plaintiffs' failed to properly serve Defendant Todd Construction, LLC pursuant to Rule 4(h); therefore, it was proper for the Circuit Court to dismiss said Defendant.

Rule 4(h) of the Mississippi Rules of Civil Procedure states as follows:

**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.

Miss. R. Civ. P. 4(h). This Court has succinctly stated that “[u]ntimely service of process is insufficient service of process.” *Heard v. Remy*, 937 So. 2d 939, 944 (Miss. 2006).

In order to establish “good cause,” Plaintiffs are required to at least show “excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.” *Lucas v. Baptist Memorial Hosp.-North Mississippi, Inc.*, 997 So. 2d 226, 230 (Miss. App. 2008)(Citing, *Watters v. Stripling*, 675 So. 2d 1242, 1243 (Miss.1996)). “This excusable neglect standard is a very strict standard.” *Id.* (Citing, *Moore v. Boyd*, 799 So. 2d 133, 136 (Miss. App. 2001)). In the case at hand, Plaintiffs do not attempt to show excusable neglect. (Appellants’ Brief at 10).

A plaintiff must be diligent to serve process within 120 days. *Id.* (Citing, *LeBlanc v. Allstate Ins. Co.*, 809 So. 2d 674, 677 (Miss. 2002); see also *Heard*, 937 So. 2d at 944 (continuing failure to attempt service of process for four months, without adequate explanation, shows a lack of diligence beyond excusable neglect)). “‘Good cause’ can never be demonstrated where [the] plaintiff has not been diligent in attempting to serve process.” *Id.* (Citing,

*Montgomery v. SmithKline Beecham Corp.*, 910 So. 2d 541, 545 (Miss. 2005)).

In the case *sub judice*, Plaintiffs failed to show diligence in attempting to serve Todd Construction. Plaintiffs' first attempt to have summons issued by the clerk with regards to Todd Construction came after the September 3, 2009 filing of Todd Construction's Motion to Dismiss, on or about October 26, 2009. (Appellant R.E. at 64, R. at 465). Said issuance was just days short of a full year after Plaintiffs filed their First Amended Complaint adding Todd Construction as a Defendant, and well after the expiration of the applicable statute of limitations. Essentially, Plaintiffs have failed to serve Todd Construction and have shown no good cause, as required by Rule 4(h), for said failure.

Plaintiffs would have this Court believe that they have obtained some type of implied perfected service of process on Todd Construction, or at least shown good cause for failure to properly serve same, simply by being diligent in serving other defendants, and by corresponding on occasion with undersigned counsel. However, Plaintiffs have shown no authority supporting this assertion. Mere assumptions on the part of Plaintiffs cannot be held equal to the diligent efforts required to adhere to the Mississippi Rules of Civil Procedure. Further, it has been previously held that the presence of negotiations between parties does not constitute good cause for failing to perfect service of process under Rule 4(h) of the Mississippi Rules of Civil Procedure. *Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1186-87 (Miss. 2002).

Plaintiffs attempt to use *Jenkins v. Oswald*, 3 So. 3d, 746 (Miss. 2009) in an effort to show diligence on their part, and therefore good cause for failure to properly serve Todd Construction. (Appellants' Brief at 10). However, *Jenkins* is easily distinguishable from the case at hand. In *Jenkins*, the plaintiff had numerous summons and alias summons issued for the particular defendant seeking dismissal. *Id.* at 750. Also, there was evidence of efforts on the part

of plaintiff to locate and served said defendant, all to no avail. *Id.*

In the case at hand, Plaintiffs did not have summons issued for Todd Construction until almost a full year after the First Amended Complaint was filed. (Appellant R.E. at 64, R. at 465). Also, there is no indication whatsoever that Plaintiffs were unable to find the registered agent for Todd Construction, Chris Todd. In fact, Plaintiffs had successfully served Chris Todd at the onset of this matter, both in his individual capacity and as registered agent for Mississippi Gravel Sales, LLC. (Appellant R.E. at 42, 44, R. at 30, 32).

Plaintiffs are unable argue that they could not find Todd Construction. Plaintiffs knew, or should have known, of the name and existence of Todd Construction, LLC at the time, or before, the original Complaint in this matter was filed. Defendant Christopher Cole Todd has been listed as the registered agent for service of process for Todd Construction, LLC since its inception in or about November, 1999. (Appellee R.E. at 22, R. at 195). This information was readily available to Plaintiffs from the onset of this matter. Further, Todd Construction was identified as an LLC company owned by Defendant Christopher Cole Todd in the sixth defense of his original answer in this matter. (Appellee R.E. at 17-21, R. at 23-27). Neither Chris Todd, nor Todd Construction, have made any efforts to evade service of process from Plaintiffs. (Appellant R.E. at 19).

Plaintiffs also cite *Trosclair v. Mississippi Dept. of Transp.*, 757 So. 2d 178 (Miss. 2000) in an effort to apply the theory of equitable estoppel to the situation at hand. However, Plaintiffs equitable estoppel argument has no place in this action because there was no representation on the part of Todd Construction for which to base a reliance. In *Trosclair*, the equitable estoppel argument was based on MDOT having made an affirmative representation to plaintiff's counsel that they had not performed the work in question, which thereby caused plaintiff to miss the one

year statute of limitations. *Id.* at 179. In the case at hand, no such representation has been made. Therefore, a key element to an equitable estoppel claim, a representation by a party, is missing in this case. *Id.* at 181.

Plaintiffs state in their brief that they had “no reason to believe that counsel for Todd Construction was not accepting process” for Todd Construction when the First Amended Complaint was served on him on October 31, 2008. (Appellants’ Brief at 10). However, Plaintiffs had no reason to believe undersigned counsel *was*, in fact, accepting service of process on behalf of Todd Construction. (Appellee R.E. at 24, R. at 202). Undersigned counsel had, and has, no authority to accept such process, and further, no request from Plaintiffs for same was ever made to undersigned counsel. (*Id.*). Undersigned counsel has never represented to Plaintiffs that he had authority to accept such process. (Appellee R.E. at 25, R. at 203).

Simply stated, Plaintiffs’ assumptions are no substitute of the Mississippi Rules of Civil Procedure. It has been held that “the rules regarding service of process are to be strictly construed.” *Tucker v. Williams*, 7 So. 3d 961, 965 (Miss. App. 2009). In reference to properly serving Todd Construction with process in this matter, Plaintiffs have failed to adhere to the applicable Mississippi Rules of Civil Procedure. Further, the Mississippi Supreme Court has stated that “even actual knowledge of a suit does not excuse proper service of process.” *Lucas*, 997 So. 2d at 230.

Although Plaintiffs would have this Court believe otherwise, the mere fact that Defendant Christopher Cole Todd was served with process individually, and as an agent for a separate company, does not imply that service has been perfected for all such companies he may serve as an agent for service of process. Plaintiffs contention that having served Chris Todd, individually, constitutes perfected service on a John Doe Company that was not even named in this matter at

the time of said service is completely unsupported by any authority or reason.

Plaintiffs further contend that the mere mentioning of Todd Construction, LLC in Affirmative Defense No. 21 and Affirmative Defense No. 22 of Defendant Christopher Cole Todd, Individually's, Answer and Affirmative Defenses to First Amended Complaint, in some manner constitutes an answer and/or appearance on behalf of Todd Construction. (Appellants' Brief at 8). Said affirmative defenses make no representations that same are on behalf of Todd Construction, but simply serve as all inclusive defenses plead affirmatively and refer to the common relationship between Chris Todd and Todd Construction with regards to Defendant Ronald Denley. (Appellant R.E. at 57-58, R. at 122-23). The title of this particular pleading, as shown immediately above, speaks for itself. (Appellant R.E. at 53, R. at 118). Assuming *arguendo*, that the tables were turned on this argument, Todd Construction would have a difficult time justifying these affirmative defenses, which were plead by a separate party in a separate pleading, as sufficient so as to serve as its own responsive pleading in an effort to avoid a default judgement.

Assuming *arguendo*, that Todd Construction would have made and appearance and filed its own separate answer to Plaintiffs' First Amended Complaint without being served with process, which it did not, *Lucas v. Baptist Memorial Hosp.-North Mississippi, Inc.*, 997 So. 2d 226 (Miss. App. 2008), shows that Todd Construction would still be entitled to dismissal with prejudice under these facts. In *Lucas*, the Mississippi Court of Appeals affirmed the dismissal with prejudice of a Defendant who had answered the Complaint, further participated in litigation, and waited 9 months before bringing its motion to dismiss based on insufficiency of service of process. *Id.*

In the case at hand, Todd Construction did not answer the First Amended Complaint, nor



did it participate in the litigation of this matter in any manner or form. (Appellant R.E. at 6-12, R. at 8-14). Plaintiffs' only argument to tie Todd Construction to the actual litigation in this matter is the mere mention of Todd Construction in the affirmative defenses of a separate party defendant. Todd Construction's first appearance or participation in this matter was in the form of its special appearance for the current Motion to Dismiss. (Appellant R.E. at 9, R. at 11). Therefore, falling woefully short of the standard set in *Lucas*, dismissal with prejudice is certainly proper in this matter.

Simply stated, Todd Construction has not been served with process in this matter. There have been no representations that undersigned counsel had authority to accept service on its behalf. There is no "implied service of process" in this matter. Plaintiffs can show no good cause for their failure to serve Todd Construction. Plaintiffs simply failed to adhere to the Mississippi Rules of Civil Procedure and perfect service of process on Todd Construction after naming same as a defendant in this matter. Further, due to the expiration of the applicable statute of limitations, the Circuit Court's dismissal of Plaintiffs' First Amended Complaint as to Todd Construction must be final and with prejudice.

2. The applicable statute of limitations has expired, thus this matter should be dismissed with prejudice as to Defendant Todd Construction, LLC.

The three (3) year applicable statute of limitations for this action is governed by Mississippi Code Annotated § 15-1-49(1), which states "all actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." Miss. Code Ann. § 15-1-49(1) (1972, as amended). However, it is well known that "the filing of a complaint even without service of process tolls the three-year statute of limitations for the 120-day period allowed pursuant to Mississippi Rule of Civil

Procedure 4(h).” *Parmley v. Pringle*, 976 So. 2d 422, 424 (Miss. App. 2008)(Citing, *Owens v. Mai*, 891 So. 2d 220, 223 (Miss. 2005)).

Further, “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.” *Id.* (Citing, *Triple “C” Transport, Inc. v. Dickens*, 870 So. 2d 1195, 1200 (Miss. 2004)). In order to further toll the statute of limitations, the plaintiff must then 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. *Id.* As shown above, Plaintiffs took no steps to extend the 120 day period and have failed to show good cause for their failure to properly serve process on Todd Construction.

This cause of action accrued on the date of the subject accident, April 29, 2006. Thus, the three (3) year statute of limitation, including the 120-day tolling period, expired on or about August 27, 2009, a fact that Plaintiffs concede. (Appellant’s Brief at 9). Plaintiffs can no longer re-file their complaint prior to the expiration of said statute of limitation, and Plaintiffs cannot show good cause for failing to serve process on Todd Construction as illustrated above. Therefore, the Circuit Court’s decision to dismiss this matter with prejudice as to Todd Construction was proper.

### **CONCLUSION**

As shown above, due to Plaintiffs’ failure to properly serve Todd Construction with a summons and copy of their First Amended Complaint in this matter within the 120 days allotted by Rule 4(h) of the Mississippi Rules of Civil Procedure, or to affirmatively show good cause for failure to do so, and the expiration of the applicable three (3) year statute of limitations as outlined by Mississippi Code Annotated § 15-1-49 (1), this Court should affirm the Circuit Court

of Monroe County, Mississippi's dismissal with prejudice as to Defendant Todd Construction, LLC.

RESPECTFULLY SUBMITTED, this the 25<sup>th</sup> day of January, 2011.

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BO R. BROCK, MSB # [REDACTED]

BY:  \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I, the undersigned Attorney for The Deaton Law Firm have this day served a copy of the foregoing *Brief of Appellee* to all counsel of record as follows by placing same in the United States Mail, properly addressed to them and with adequate postage thereon.

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Honorable Thomas J. Gardner, III  
Monroe County Circuit Court Judge  
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DATED, this the 25<sup>th</sup> day of January, 2011.

  
\_\_\_\_\_  
BO R. BROCK

**CERTIFICATE OF FILING**

I, the undersigned Attorney for The Deaton Law Firm have this day filed four (4) copies of the foregoing *Brief of Appellee* with the Clerk as follows by placing same in the United States Mail, properly addressed to her and with adequate postage thereon.

Ms. Kathy Gillis, Clerk  
Supreme Court of the State of Mississippi  
Court of Appeals of the State of Mississippi  
Post Office Box 117  
Jackson, MS 39205

DATED, this the 25<sup>th</sup> day of January, 2011.

  
\_\_\_\_\_  
B. R. BROCK