

**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**

---

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

---

**BRIEF FOR APPELLANTS**

**T. K. MOFFETT (MS Bar No. [REDACTED])**

**MOFFETT LAW FIRM, PLLC  
401 North Main Street  
Amory, MS 38821  
Telephone: (662) 257-0809  
Facsimile: (662) 257-9988**

**Attorney for Appellants**

**ORAL ARGUMENT IS NOT REQUESTED**

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

**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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- **Troy Lundquist**, Smithville, MS [Plaintiff/Appellant; injured party]
- **Jennifer Lundquist**, Aberdeen, MS [Plaintiff/Appellant; spouse of Troy Lundquist at time of accident];
- **Honorable T.K. Moffett**, Tupelo, MS [attorney for the Plaintiffs/Appellants];
- **Todd Construction, LLC**, Aberdeen, MS [Defendant/Appellee];
- **Chris Todd**, Aberdeen, MS [Defendant; owner of Mississippi Gravel Sales and Todd Construction];
- **Ronald Denley**, Okolona, MS [Defendant];
- **Honorable Bo Brock**, Tupelo, MS [attorney for Chris Todd and Todd Construction, LLC];
- **Honorable Goodloe Lewis**, Oxford, MS [attorney for Ronald Denley];

- **Honorable Josh Stevens**, West Point, MS [attorney for Mississippi Gravel Sales];
- **Honorable Thomas J. Gardner**, Tupelo, MS (presiding Circuit Court judge).

RESPECTFULLY SUBMITTED, this the 8<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
**T.K. Moffett** (MSB#: [REDACTED])  
Attorney for Appellants

## **TABLE OF CONTENTS**

Certificate of Interested Persons .....	<i>i</i>
Table of Authorities .....	<i>iv</i>
Statement of the Issues .....	1
Statement of the Case .....	2
Procedural History .....	2
Statement of Facts .....	5
Summary of the Argument .....	6
Argument .....	7
Conclusion .....	11
Certificate of Service .....	12
Certificate of Filing .....	13

## **TABLE OF AUTHORITIES**

### **Statutes**

<i>MCA</i> §15-1-49 .....	7
---------------------------	---

### **Court Rules**

<i>MCRP</i> 4(h) .....	1, 4, 6, 7, 9
------------------------	---------------

### **Judicial Decisions**

<i>Carr v. Town of Shubuta</i> , 733 So.2d 261 (Miss. 1999) .....	10
<i>Foss v. Williams</i> , 993 So.2d 378 (Miss. 2009). ....	6
<i>Fritsch v. St. Croix Cent. Sch. Dist.</i> , 515 N.W.2d 328 (Wis.Ct.App. 1994).....	10
<i>Holmes v. Coast Transit Authority</i> , 815 So.2d 1183 (Miss. 2002) .....	10
<i>Jenkins v. Oswald</i> , 3 So.3d 746 (Miss. 2009).....	7, 10
<i>Owens v. Mai</i> , 891 So.2d 220 (Miss. 2005).....	7, 8
<i>Rains v. Gardner</i> , 731 So.2d 1192 (Miss. 1999).....	6
<i>Trosclair v. Mississippi Dept. of Transp.</i> , 757 So.2d 178 (Miss. 2000).....	10
<i>Watters v. Stripling</i> , 675 So.2d 1242 (Miss. 1996) .....	9

**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**

**STATEMENT OF THE ISSUES**

1. Whether the Monroe County Circuit Court erred in dismissing Plaintiffs' First Amended Complaint as to Defendant, Todd Construction, LLC, for failure to serve process within one-hundred twenty (120) days as prescribed by Rule 4(h) of the Mississippi Rules of Civil Procedure.

**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**

**BRIEF FOR THE APPELLANTS**

**STATEMENT OF THE CASE**

Procedural History

On April 29, 2006, Troy Lundquist was driving a 2006 Harley Davidson motorcycle, and was traveling in the outside lane of the two northbound lanes of Highway 45 in Monroe County, Mississippi. (RE-34-35, CP-62-63). At approximately the same time, Defendant Ronald Denley, who was traveling in the inside lane of the two southbound lanes of Highway 45, attempted to turn left across the two northbound lanes, into the path of Mr. Lundquist. (*Id*). Mr. Lundquist's motorcycle collided into the right side passenger door of Denley's vehicle, causing extensive damage to the motorcycle and severely injuring Mr. Lundquist. (RE-29-33, CP-15-19).

At the time, Troy Lundquist was married to Jennifer Lundquist, and a Complaint was filed on their behalf on the 3rd day of August, 2006 in Monroe County Circuit Court Cause Number 06-233-GM. (*Id*). Listed as Defendants were Ronald Denley; Christopher Cole Todd, individually and d/b/a Mississippi Gravel Sales, LLC; and John Doe Company.

(Id). The Lundquists alleged Denley was negligent in failing to keep the vehicle being operated by him under proper and lawful control and that he was negligent in failing to maintain a proper lookout for other vehicles lawfully using the public roads of the State of Mississippi. (RE-31, CP-17). As to Defendants Todd and Mississippi Gravel Sales, the Lundquists alleged that Denley was in the scope of his employment with said Defendants and that the doctrine of *respondeat superior* applied. (RE-32, CP-18). John Doe Company was believed to be another company of Chris Todd's for whom Defendant Denley may have been employed. (RE-30, CP-16).

Process was served on Ronald Denley on August 12, 2006 (RE-40-41, CP-28-29), nine days after the Complaint was filed; and process was served on Christopher Todd, individually, and on Mississippi Gravel Sales, LLC on the 16<sup>th</sup> day of August, 2006. (RE-42-45, CP-30-33), 13 days after the Complaint was filed. Denley, represented by Honorable Goodloe Lewis, filed an Answer to Plaintiffs' Complaint on the 22nd day of September, 2006 (CP-36). Chris Todd is represented by two (2) separate attorneys, Honorable Josh Stevens in West Point, Mississippi, and Honorable Bo Brock in Tupelo, Mississippi. An Answer was filed on behalf of Chris Todd, individually, and Mississippi Gravel Sales on the 12<sup>th</sup> day of September, 2006. (RE-23).

The parties engaged in discovery and settlement negotiations over the course of the next two years. (CP-8-12). It was revealed through discovery that Defendant Todd did, in fact, have another business, Todd Construction, LLC, for whom Defendant may have been employed. (CP-92). Plaintiffs' sought leave of Court to amend their



Complaint to add Todd Construction as a party Defendant (*Id.*), and Plaintiffs' First Amended Complaint was filed on the 3<sup>rd</sup> day of November, 2008. (RE-46, CP-107). Plaintiffs served by U.S. Mail the First Amended Complaint on all counsel of record on the 31<sup>st</sup> day of October, 2008. (RE-51, CP-112). Denley filed a Response to the First Amended Complaint on or about the 10<sup>th</sup> day of November, 2008 (RE-60, CP-114), and Todd filed a Response to the First Amended Complaint on or about the same date. (RE-53, CP-118). In his response, Todd pled that neither he *nor Todd Construction* employed Denley. (RE-57; CP-122). Todd further pled that Denley was acting as an independent contractor at the time of the accident and that neither Todd individually *nor Todd Construction* are vicariously liable for Denley's actions under the doctrine of *respondeat superior*. (RE-58, CP-123).

On or about the 1<sup>st</sup> day of September, 2009, ten months after Plaintiffs filed their First Amended Complaint, Defendant Todd filed a Motion to Dismiss as to Defendant Todd Construction for failure to serve process within 120 days as prescribed by Rule 4(h) of the Mississippi Rules of Civil Procedure. (CP-142). Plaintiffs filed a Response to the Motion to Dismiss and requested that if the Court found process insufficient that they be granted additional time within which to perfect process on Todd Construction. (RE-57; CP-163). A hearing was finally held on Todd's Motion on the 4th day of March, 2010. (RE-14-28). The Court granted Defendant's Motion, and an Order dismissing Plaintiffs' First Amended Complaint as to Defendant Todd Construction was entered on or about the 8th day of March, 2010. (RE-13, CP-509). Aggrieved by the trial court's

ruling, Plaintiffs perfected this appeal on the 7th day of April, 2010. (CP-528).

### Statement of Facts

Plaintiffs original Complaint was filed on the 3<sup>rd</sup> day of August, 2006, and Plaintiffs were diligent in serving process on all known Defendants at that time. It became known during the course of litigation that the John Doe Company was actually "Todd Construction, LLC". Chris Todd operates both Mississippi Gravel Sales and Todd Construction – Chris Todd *is* Mississippi Gravel Sales and Todd Construction. Todd is represented by two attorneys, Joshua Stevens of West Point, Mississippi, and Bo Brock of Tupelo, Mississippi. Prior to the filing of the First Amended Complaint, the parties engaged in settlement negotiations and discovery, and all correspondence as to Todd individually and Todd Construction was engaged by and through their attorney. At the time Plaintiffs filed their First Amended Complaint, all parties were noticed with same by and through their respective attorneys, including Todd Construction. Todd, individually, in his Answer to the First Amended Complaint, responded on behalf of Todd Construction by affirmatively pleading that Denley was not an employee of Todd Construction and that Todd Construction is not vicariously liable for the actions of Denley under the doctrine of *respondeat superior*. Plaintiffs, to their detriment, relied on this responsive pleading as one on behalf of Todd Construction as well as Todd individually, as well as the settlement negotiations with Todd/Todd Construction's lawyer (RE-57-58; CP-122-123; RE-96, CP-192).

## **SUMMARY OF THE ARGUMENT**

The Monroe County Circuit Court held that good cause did not exist for Plaintiffs' failure to properly serve process on Todd Construction within 120 days, and thereby dismissed the First Amended Complaint as to Todd Construction. In determining whether good cause exists, the Mississippi Supreme Court has held that the decision *"would be a discretionary ruling on the part of the trial court and entitled to deferential review of whether the trial court abused its discretion and whether there was substantial evidence supporting the determination."*<sup>1</sup> In its bench ruling, the court stated,

*"If I understand the rule, the process must be served within 20 (sic) days or the court is directed by use of the word 'shall' dismiss the cause...if there has been no service of process within 120 days mandated by the law, then I think the defendant, Todd Construction, LLC is entitled to and is dismissed." (RE-28).*

Rule 4(h) of the Mississippi Rules of Civil Procedure states,

*"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."*

"Good cause" is a finding of fact "entitled to deferential review of whether the trial court abused its discretion and whether there was substantial evidence supporting the

---

<sup>1</sup> *Rains v. Gardner*, 731 So.2d 1192, 1197 (Miss. 1999).

determination."<sup>2</sup> Although there is no clear-cut definition of "good cause" articulated within Rule 4(h), the Mississippi Supreme Court has held,

*"Good cause is likely (but not always) to be found when the plaintiffs failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances, or the plaintiff is proceeding pro se or in forma pauperis."*<sup>3</sup>

Appellants believe that good cause did exist because they had at all times been diligent in serving process and because there are understandable mitigating circumstances which would warrant a finding of "good cause" on behalf of the Plaintiffs.

### **ARGUMENT**

#### **I. THE CIRCUIT COURT ERRED BY DISMISSING THE LUNDQUISTS' COMPLAINT AS TO DEFENDANT TODD CONSTRUCTION FOR FAILURE TO SERVE PROCESS WITHIN ONE-HUNDRED TWENTY (120) DAYS.**

The motor vehicle accident which is the subject of this litigation is controlled by §15-1-49 of the *Mississippi Code of 1972, Annotated*, as amended, 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."*

Lundquist's accident occurred on April 29, 2006. The filing of a complaint tolls

---

<sup>2</sup> *Foss v. Williams*, 993 So.2d 378 (Miss. 2008), citing *LeBlanc v. Allstate Ins. Co.*, 809 So.2d 674, 676 (Miss. 2002) and *Rains v. Gardner*, 731 So.2d 1192 (Miss. 1999).

<sup>3</sup> *Jenkins v. Oswald*, 3 So.3d 746, 749-50 (Miss. 2009); see also *Holmes v. Coast Transit Authority*, 815 So.2d. 1183, 1186 (Miss. 2002).

the statute of limitations and extends it by 120 days for service of process.<sup>4</sup> If the defendant is not served with process within 120 days of filing suit, the statute begins to run again.<sup>5</sup> In the case at bar, the Plaintiffs filed their original Complaint on August 3, 2006. All known defendants were promptly served with process. Their First Amended Complaint substituting Todd Construction for John Doe Company was filed on November 3, 2008, still well within the original statute of limitations, and process was served on all counsel of record the same date, including counsel for Todd Construction. Plaintiffs had been in settlement negotiations with Todd/Todd Construction's attorney for some time prior to the filing of the First Amended Complaint. While Plaintiffs admit that process was not served directly on Todd Construction, it was served on its counsel, who had been actively involved in this litigation on behalf of Todd Construction virtually from the outset. More importantly, counsel for Todd filed an Answer on or about the 10<sup>th</sup> day of November, 2008, setting forth a number of affirmative defenses, including defenses for Todd Construction: Affirmative Defense No. 21 states, *"Neither Defendant Todd **nor Defendant Todd Construction** [emphasis added] are employers of Ronald H. Denley."* (RE-57; CP-122). Affirmative Defense No. 22 states, *"Defendant Denley was acting as an independent contractor at the time of the subject accident, and therefore, neither Defendant Todd **nor Defendant Todd Construction** [emphasis added] are vicariously liable for his action under the theory of respondeat superior."* (RE-58; CP-123).

---

<sup>4</sup> *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005).

Plaintiffs, to their detriment, did not question service of process based on the Answer filed by Todd, and they relied on these responses as an Answer on behalf of Todd Construction.

Furthermore, litigation continued over the course of the next ten months, including discovery. At no time during this period did Todd Construction raise the issue of insufficient service of process. It was not until November, 2009 that counsel for Todd Construction made a "special appearance" for the purpose of filing a Motion to Dismiss. It is of note that Todd Construction did not file the Motion to Dismiss at the expiration of the 120-day deadline prescribed in Rule 4(h), but rather waited to raise the issue until after the final expiration of the statute of limitations because he knew Plaintiffs were diligent in serving process and would diligently seek to perfect service once it was discovered that process was lacking. (The original statute of limitations ran on April 29, 2009, three years after the date of the accident. Adding to the statute 120 days as prescribed by Rule 4(h), the final statute would run on or about August 27, 2009.) Plaintiffs relied to their detriment on the negotiations with Todd/Todd Construction's counsel and the Answer filed by said counsel to the First Amended Complaint.

The Mississippi Supreme Court has held that,

*"a plaintiff attempting to establish 'good cause' must show 'at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.'"*<sup>6</sup>

---

<sup>5</sup> Id.

Plaintiffs' do not plead excusable neglect or inadvertence, but rather, detrimental reliance based on pleadings, discovery, and settlement negotiations of Defendants.

In *Jenkins*, the Court held that good cause could be found if the plaintiff has acted diligently in trying to effect service of process or if there are understandable mitigating circumstances.<sup>7</sup> Applying the Court's holding in *Jenkins*, Plaintiffs believe that there are understandable mitigating circumstances warranting a "good cause" showing. The responsive pleading filed by Todd to the First Amended Complaint, even though titled differently, is in fact an answer on behalf of Todd Construction. Further, the Mississippi Supreme Court held in *Trosclair v. Mississippi Dep't of Transport.*, 757 So.2d 178 (Miss. 2000) that the Department of Transportation was equitably estopped from asserting a statute of limitations defense because of Trosclair's detrimental reliance to representations made by MDOT. "*Estoppel is action or nonaction that induces another's reliance thereon, either in the form of action or nonaction, to his or her detriment.*"<sup>8</sup> In order for equitable estoppel to apply, there must be a representation by a party, reliance by the other party, and a change in position by the relying party.<sup>9</sup> The Lundquists had no reason to believe that counsel for Todd Construction was not accepting process when the First Amended Complaint was served on him on October 31, 2008. Plaintiffs believe that this was confirmed by Todd's responsive pleading to the First Amended Complaint which *specifically* addressed Todd

---

6 *Watters v. Stripling*, 675 So.2d 1242, 1243 (Miss. 1996).

7 *Jenkins v. Oswald*, 3 So.3d 746, 749-50 (Miss. 2009); see also *Holmes v. Coast Transit Authority*, 815 So.2d. 1183, 1186 (Miss. 2002).

8 *Carr v. Town of Shubuta*, 733 So.2d 261 (Miss. 1999), quoting *Fritsch v. St. Croix Cent. Sch. Dist.*, 515 N.W.2d 328 (Wis.Ct.App. 1994).

Construction. Like the Department in *Trosclair*, Todd/Todd Construction continued with negotiations and litigation and waited for the statute of limitations to expire.

The Lundquists were diligent in serving process on the known Defendants subsequent to the filing of their original Complaint, and they were diligent in serving process with the filing of their First Amended Complaint. Applying *Trosclair*, Defendant Todd Construction should be equitably estopped from asserting a statute of limitations claim, and Plaintiffs, for good cause shown, should be allowed to perfect process on Defendant Todd Construction in accordance with Rule 4(h) of the Mississippi Rules of Civil Procedure.

### **CONCLUSION**

For the foregoing reasons, good cause exists for Appellants' failure to serve process on Todd Construction within the time prescribed by Rule 4(h) of the Mississippi Rules of Civil Procedure. Therefore, the ruling of the Monroe County Circuit Court should be reversed, and the Plaintiffs should be granted time within which to perfect service of process on the Defendant, Todd Construction, LLC.

RESPECTFULLY SUBMITTED, this the 8<sup>th</sup> day of November, 2010.

**TROY LUNDUIST and  
JENNIFER LUNDQUIST**, Appellants

  
**T.K. MOFFETT** (MS Bar No. [REDACTED])  
Attorney for Appellants



**CERTIFICATE OF SERVICE**

This is to certify that I, **T.K. Moffett**, have this day delivered a true and correct copy of the above and foregoing **BRIEF FOR APPELLANTS** to the following individuals by placing a copy of same in United States mail, postage prepaid, and mailing to them at their usual business addresses:

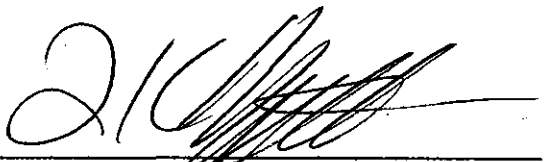
Honorable Bo R. Brock  
Deaton & Deaton, P.A.  
Attorneys at Law  
P.O. Box 1726  
Tupelo, MS 38802

Honorable Goodloe Lewis  
Hickman, Goza & Spraggins, PLLC  
Attorneys at Law  
PO Drawer 668  
Oxford, MS 38655

Honorable J. Joshua Stevens, Jr.  
Tubb, Stevens & Morrison  
Attorneys at Law  
P.O. Box 324  
West Point, MS 39773

Honorable Thomas J. Gardner  
Circuit Court Judge, District 1  
PO Drawer 1100  
Tupelo, MS 38802

Dated, this the 8th day of November, 2010.

  
**T. K. MOFFETT**  
Attorney for Appellants

**CERTIFICATE OF FILING**

The original and three (3) copies of the **Brief for Appellants** have this date been filed by depositing same with *Federal Express* to be delivered to:

Ms. Betty W. Sephton, Clerk  
Supreme Court of the State of Mississippi  
Court of Appeals of the State of Mississippi  
P.O. Box 249  
Jackson, MS 39205-0249

Dated, this the 8th day of November, 2010.

  
**T. K. MOFFETT**  
Attorney for Appellants

*OF COUNSEL:*

**MOFFETT LAW FIRM, PLLC**  
401 NORTH MAIN STREET  
AMORY, MISSISSIPPI 38821  
TELEPHONE: (662) 257-0809  
FACSIMILE: (662) 257-9988