IN THE SUPREME COURT OF MISSISSIPPI

ARTHUR GERALD HUDSON and
LINDA S. HUDSON **APPELLANTS**

v. **No. 2010-TS-0101958**

LOWE'S HOME CENTERS, INC. and
JOHN DOE, UNKNOWN FORKLIFT OPERATOR **APPPELLEES**

BRIEF OF APPELLEE, LOWE'S HOME CENTERS, INC.

Oral Argument Not Requested

JAMES H. HEIDELBERG (M[redacted]
JESSICA M. DUPONT (MSB[redacted]
HEIDELBERG, STEINBERGER, COLMER & BURROW, P.A.
POST OFFICE BOX 1407
711 DELMAS AVENUE
PASCAGOULA, MS 39568-1407
TELEPHONE: 228-762-8021
FACSIMILE: 228-762-7589

ATTORNEYS FOR APPELLEE
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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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Arthur Gerald Hudson, Appellant
2. Linda S. Hudson, Appellant
3. Lowe's Home Centers, Inc., Appellee
4. Chuck McRae, Esq., Counsel for Appellants
5. Ken Adcock, Esq., Counsel for Appellee
6. James Heidelberg, Esq., Counsel for Appellee
7. Jessica M. Dupont, Esq., Counsel for Appelee
8. The Honorable Kathy King Jackson, Jackson County Circuit Court Judge

This the 16th day of May, 2011

Attorney for Lowe's Home Centers, Inc.

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STATEMENT OF THE ISSUES

1. Mississippi law requires that process served on a domestic corporation be delivered to its officer, managing or general agent, or an agent authorized by law to receive service. Plaintiffs allege they attempted to serve Lowe's prior to the expiration of the statute of limitations by placing a summons and complaint on the doorstep of its attorney's office. That attorney was not Lowe's officer, agent or registered agent for service. Accordingly, this alleged service was not proper. Further, Plaintiff could not logically have relied on any subsequent admissions made by Lowe's in its Answer after it had been properly served (albeit untimely) through its registered agent for service of process and such admissions do not relate back to the time of the alleged "doorstep" service.

2. Upon determining that service was not proper, the trial court dismissed Plaintiffs' Complaint pursuant to Miss. R. Civ. P. 4(h). Plaintiffs contend that this dismissal should be reversed because ongoing settlement negotiations constituted "good cause" for the failure of service. In *Holmes v. Coastal Transit Authority*, this Court expressly rejected the assertion that settlement negotiations are "good cause" under Rule 4(h). The trial court did not abuse its discretion in finding that "good cause" did not exist.

STATEMENT OF THE CASE

This lawsuit arises from an incident at a Lowe's Home Centers, Inc. store in Pascagoula, Mississippi, on May 5, 2006. (R.7) Plaintiff Arthur Gerald Hudson alleges he was injured by a forklift operated by a Lowe's employee. (R. 7) Plaintiff Hudson and his wife Linda did not immediately file suit, and the three year statute of limitations prescribed by Miss. Code Ann. § 15-1-49 was set to expire on May 5, 2009. (R. 3) The parties, however, agreed to enlarge the statute of limitations, entering into three separate tolling agreements which extended the time to file suit to July 31, 2009. (R. 12, 30, 31)

On July 27, 2009, Plaintiffs filed a Complaint in the Circuit Court of Jackson County, Mississippi, tolling the statute of limitations and commencing the 120-day period for proper service of process. (R. 3) Court records show that on August 3, 2009, the Circuit Clerk issued a summons addressed to Lowe's registered agent for service, Corporation Service Company. (R. 13) Three days later, counsel for the Plaintiffs alleges he attempted to "serve" Lowe's, not by providing a copy to the registered agent for Lowe's described in the Summons, but rather by leaving a copy of the Summons and Complaint propped up outside the door of one of Lowe's attorneys, Ken Adcock. (R. 88) No other attempt was made to serve Corporation Service Company or Lowe's itself during the 120-day period. Plaintiffs sought no extension of time to serve.

On November 24, 2009, the time period for proper service elapsed, and the statute of limitations resumed the next day. Four days later, on November 28, 2009, the statute of limitations expired. It was not until January 20, 2010, that Lowe's registered agent actually received service of process. (R. 15) On February 10, 2010, Lowe's answered the Complaint, asserting that the Plaintiffs' claims were barred by the statute of limitations. (R. 18) Subsequently, Lowe's filed its Motion to Dismiss. (R. 26) In response, Plaintiffs for the first time provided a "proof of service" alleging that service was made on Ken Adcock on August 6, 2009. (R. 124) This "proof of service" was signed by Plaintiffs' counsel, but was not submitted to a notary public until November 2, 2010, fifteen months after the alleged service. (R. 124)

The Circuit Court ultimately granted the Motion to Dismiss on November 15, 2010. (R. 127) The Court determined that Plaintiffs' alleged attempted service on Adcock was made upon an improper person in an improper manner and that no good cause existed for the failure of timely service. (R. 127-29) For a chart depicting the relevant dates in this matter, see Appendix 1 attached hereto.

SUMMARY OF THE ARGUMENT

Service was not properly completed during the 120-day period required by law. Nor was service completed prior to expiration of the statute of limitations. There is no credible legal or factual argument that "good cause" existed for the failure of service within the service or limitation period. For both of these reasons, this Court should affirm the trial court's dismissal of this case with prejudice.

Plaintiffs' sole alleged attempt to serve Lowe's within the statute of limitations period was defective in two ways. First, the person whom Plaintiffs attempted to serve – Lowe's attorney, Ken Adcock – had no lawful authority to receive service. Adcock was not and is not Lowe's registered agent for service. At all relevant times, Lowe's has maintained a single agent for proper service, Corporation Service Company. (R. 17) The record, and the Summons issued by the clerk, demonstrates that Plaintiffs were aware of this agent's existence and location. (R. 6, 17) Further, the Mississippi Court of Appeals has expressly held that service on a corporation's attorney is improper when that attorney is not specifically authorized to receive process. There is also no merit to Plaintiffs' argument that subsequent admissions in Lowe's Answer validated Plaintiffs' alleged prior service on Adcock. Lowe's could not designate an agent for service *after* the Complaint was already served. Plaintiffs cite no authority that improper service can later be made proper by an admission occurring five months after the defective attempt.

Second, the manner of Plaintiffs' attempted service was inadequate. Leaving process outside Adcock's office door is not permissible, even if Adcock had authority to receive it. The rules of service require a process server to deliver the documents to an individual or agent. Mississippi law provides that leaving service of process unattended when the intended recipient cannot be located is not an acceptable method for perfecting personal service under Rule 4.

Finally, Plaintiffs have not demonstrated that the trial court abused its discretion in determining that no good cause existed for their failure to serve. At the heart of Plaintiffs' "good cause" argument is the assertion that ongoing settlement negotiations constitute good cause. This Court has squarely rejected that theory. Moreover, Plaintiffs' factually unsubstantiated allegations of misconduct do not excuse their lack of diligence in perfecting proper service.

For each of these reasons, this Court should affirm the trial court's dismissal of Plaintiffs' suit with prejudice.

ARGUMENT

I. Lowe's was not properly served because, in violation of Rule 4, Plaintiffs failed to personally deliver process to its registered agent for service.

Plaintiffs'sole alleged attempt to serve process on Lowe's prior to the expiration of the statute of limitations was defective for two reasons. First, the person allegedly served – Lowe's attorney, Ken Adcock – had no lawful authority to accept service. Second, the manner of alleged service was improper as "leaving a complaint propped against defense counsel's door is 'not an authorized means to serve process upon a corporate entity.'" (R. 128) (quoting *Tucker v. Williams*, 7 So. 3d 961, 967 (Miss. App. 2009)). Indeed, "the only specific method for serving a 'domestic corporation' is to deliver 'a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by law to receive service of process.'" *Tucker*, 7 So. 3d at 967 (quoting Miss. R. Civ. P. 4(d)(4)). Pursuant to this rule, Plaintiffs' sole alleged attempt at service prior to the expiration of the statute of limitations was defective, and the trial court correctly dismissed the Complaint for want of proper service. Accordingly, Plaintiffs' claims are barred with prejudice, as the applicable statute of limitations had expired by the time proper service occurred.

A. Attorney Ken Adcock was not Lowe's authorized agent for service and could not accept service on Lowe's behalf. In *Tucker v. Williams*, the Mississippi Court of Appeals squarely rejected the argument that a corporation's attorney has de facto authority to receive service on its behalf.

An attorney does not have authority to accept service merely because he represents a party. *Ransom v. Brennan*, 437 F.2d 513, 518 (5th Cir. 1971). More is required. *Id.* The Mississippi Court of Appeals considered the propriety of service on a corporation's attorney in *Tucker v. Williams*. 7 So. 3d at 962. There, the plaintiffs attempted to serve the defendant corporation by mailing process to the attorney representing the defendant in the underlying transaction. *Id.* The Court disagreed with the plaintiffs' contention that service was proper because they had extensive interaction with this attorney prior to the filing of suit. *Id.* at 967. Citing Rule 4(d)(4), the Court emphasized that the record contained no evidence establishing that the corporation's attorney was "an officer, a managing agent, a general agent, [or] a registered agent to receive service of process . . . ." *Id.* at 966. The Court also observed that the plaintiffs knew who the actual agent for service was and where he could be found. *Id.* at 962. On these bases, the Court expressly refused to find that service on the defendant's attorney was proper. *Id.* at 966.

Additionally, the Court in *Tucker* dismissed the plaintiffs' argument that the attorney's actions and correspondence in the underlying matter transformed him into an agent for service. *Id.* at 967. Instead, the Court concluded that the failure of proper service and the lack of an appearance by the defendant deprived the trial court of personal jurisdiction. *Id.* at 968. The Court's analysis in *Tucker* supports the rule that an attorney's involvement in a case, no matter how substantial, does not in itself circumscribe the requirement that service be made on a corporation's authorized agent.

Further, as a matter of policy, the rules governing service of process exist to prevent confusion for litigants and to ensure that corporate entities have proper notice of civil suits. A

corporation the size of Lowe's is represented on any given occasion by a large number of attorneys at various firms. State law requires a corporate entity to designate a centralized agent for service specifically to aid potential litigants. *See* Miss. Code Ann. § 79-4-5.01. Lowe's did this by designating Corporation Service Company. A corporation also benefits from the ability to monitor litigation by funneling service to this single agent. A plaintiff is not able to haphazardly serve an attorney merely because of his prior involvement with a corporate defendant.

B. Even if Adcock were authorized to receive service on Lowe's behalf, leaving a copy of the Summons and Complaint on the doorstep of his office is not a permissible method for service.

Proper service cannot be made by leaving a summons and complaint unattended at a place of business. Assuming for the sake of argument that Adcock was a proper agent for service on Lowe's, which he was not, Plaintiffs have not identified any authority which permits service on a corporation by abandoning documents outside of its agent's office. In fact, the Court of Appeals has specifically concluded that merely leaving a summons and complaint on a corporation's property is not appropriate. *Tucker*, 7 So. 3d at 967. Placing service of process on corporate premises "when the intended recipient cannot be located is clearly not one of the methods for perfecting personal service under Rule 4." *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So. 2d 679, 682 (Miss. App. 2006).

Where a plaintiff chooses to serve a corporation via personal delivery of process, the summons and complaint must be handed to an actual person. Under Rule 4, two methods of service on a corporation exist: service by mail or delivery by hand. Miss. R. Civ. P. 4(c) & (d). Here, Plaintiffs chose to hand deliver the Summons and Complaint. (R. 126) Not finding anyone at Adcock's office, the server allegedly elected to leave the documents at the door, unjustifiably trusting that an authorized individual would find and deliver them to Adcock. (R.

89) The rules simply do not permit service of this kind. Even if Adcock could not be found, Plaintiffs were required to ensure that an individual with authority to accept service on his behalf took custody of the Summons and Complaint. *See Johnson v. Rao*, 952 So. 2d 151, 156 (Miss. 2007).

Even the rules governing service on an individual – which provide more avenues for service than the rules regarding service on a corporation – do not permit "doorstep service." When an individual is served at his home, the documents must still be left with a person of suitable age and discretion. *See* Miss. R. Civ. P. 4(d). Certainly, the rules requiring that service be accepted by a competent individual speak to the policy concerns of the courts. Plaintiffs ought not be able to assert proper service where a defendant's actual receipt of process is governed by chance. A document left on the doorstep is as likely to be inadvertently discarded as it is to reach the individual for whom it was intended.

Under these circumstances, service was not made on a proper person nor in a proper manner. On either basis, this Court should find that Plaintiffs failed to comply with Rule 4(h), and thereby affirm the trial court's dismissal.

C. Lowe's alleged "admission" in its Answer to Plaintiffs' Complaint served after the statute of limitations had expired has no bearing on the validity of previous service attempts before the statute of limitations had expired.

Plaintiffs assert, without authority, that Lowe's counsel must accept service on its behalf because Lowe's admitted in its Answer that Adcock could be served at his offices. This proposition is flawed in several ways. In making this argument, plaintiffs attempt to advance a kind of "reliance" argument that they could rely on a Lowe's statement in its Answer, regarding service, that occurred only *after* the statute of limitations had expired.

However, Plaintiffs' own Complaint undercuts their argument that service was proper on Adcock. (R. 6) The Complaint plainly shows that Plaintiffs were aware of the existence and

location of Lowe's actual registered agent, Corporation Service Company, before service was attempted on Adcock. (R. 6) Further, the Summons that Plaintiffs provided to Lowe's after the statute of limitations expired was issued to the proper authorized agent for service, Corporation Service Company, not to Adcock. (R. 13) These facts together demonstrate Plaintiffs' actual awareness that Lowe's could and must be properly served through its agent.

Second, from a practical perspective, Plaintiffs cannot rely on a statement regarding service made in an Answer, *after* the Complaint was already served, and after the statute of limitations had expired. The Answer, by definition, is required to be filed only after proper service of process. Miss. R. Civ. P. 12(a) (directing defendants to serve an answer within 30 days "after the service of the summons and complaint"). In this case, the Answer – and the statement concerning Adcock's address and his prospective authority to receive process – was filed twenty days after Lowe's registered agent was properly served, after the statute of limitations had expired, and five months after Plaintiffs' defective attempt to serve process at Adcock's office. (R. 3-5, 15, 18, 126) As this statement was made after the statute of limitations had expired, any possible effect that this admission had only began on the date the Answer was filed, after limitations had run, was only effective going forward, and could have no effect on whether Lowe's was properly served previously.

Finally, as noted by the trial court, any admission by Adcock that he was authorized to accept service on Lowe's behalf is insufficient, standing alone, to establish such authority. (R. 128) (quoting *United States v. Ziegler Bolt and Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997)); 2A James W. Moore, Moore's Federal Practice, at 4-176 (2d ed. 1996)); *see also Ransom v. Brennan*, 437 F.2d 513, 518 (5th Cir. 1971). "A general grant of authority to an attorney is not enough to imply authority to receive process." *Ziegler*, 111 F.3d at 881. Here, the facts on record conclusively demonstrate that Lowe's at all relevant times had only one registered agent

for service, Corporation Service Company. (R. 15, 17, 114) None of the facts establish that Adcock was authorized to receive service when it was attempted. Plaintiffs may not "fabricate such implied authority from whole cloth to cure a deficient service." *Id.*

II. The lower court did not abuse its discretion when dismissing Plaintiffs' case under Rule 4(h). Plaintiffs' assertion that ongoing settlement negotiations and "misconduct" by Lowe's counsel constitute "good cause" for the failure of timely service has no basis in law or fact.

Because Plaintiffs' only attempt at service within the 120-day period was defective, this Court must consider whether good cause exists for Plaintiffs' failure to make timely service. The court below concluded that it did not. This Court reviews that determination for an abuse of discretion. *Stutts v. Miller*, 37 So. 3d 1, 3 (Miss. 2010). "It cannot be overstated that our trial courts are entitled to 'deferential review' in matters that require a discretionary ruling. *Jenkins v. Oswald*, 3 So. 3d 746, 751 (Miss. 2009) (Pierce, J., concurring).

Among the trial court's reasons for refusing to find "good cause" was its determination that Plaintiffs had not been diligent in attempting to serve Lowe's. (R. 129) This Court has consistently emphasized that "good cause can *never* be demonstrated where the plaintiff has not been diligent in attempting to serve process." *Montgomery v. SmithKline Beecham Corp.*, 910 So. 2d 541, 545 (Miss. 2005) (emphasis added). Here, Plaintiffs' entire case for diligence rests on just one alleged attempt at service which was not in compliance with Mississippi rules or settled jurisprudence, or to Lowe's registered agent. The trial court's determination that a single, failed effort to serve Lowe's did not demonstrate diligence was not an abuse of discretion and should be affirmed.

Additionally, although Plaintiffs' brief implies otherwise, this Court has flatly rejected the notion that substantial compliance suffices to make service proper. To be sure, this Court has refused to find good cause under circumstances more compelling than these. For instance, in *Perry v. Andy*, pro se plaintiffs attempted to serve a defendant by delivering a copy of the

complaint, sans summons, to the defendant at his place of business. 858 So. 2d 143, 144-45 (Miss. 2003). A proper summons was not served on the defendant until after the 120-day period had elapsed. *Id.* The plaintiffs vigorously argued that substantial compliance with Rule 4, coupled with the defendant's actual notice of the lawsuit, made service proper. *Id.* at 147-48. This Court rejected their argument on both grounds. *Id.* First, the Court concluded that "prevailing case law strongly favors the view" that the plaintiffs must be held to a strict compliance standard. *Id.* at 149. The Court reached this decision even while acknowledging the difficult position of a pro se plaintiff. *Id.* Further, the Court implicitly rejected the notion that actual notice was sufficient, observing that the defendant was fully aware of the lawsuit and then determining that the case should nonetheless be dismissed. *See id.* at 145-46.

Here, Plaintiffs cannot complain about a lack of representation or knowledge of the rules. They have at all times been fully represented. This Court has noted that "[i]f pro se litigants are expected to strictly comply with the 120 day limit, then surely litigants represented by attorneys must be held to the same standard." *Powe v. Byrd*, 892 So. 2d 223, 227 (Miss. 2004). As the Court repeated with approval in *Perry*, "the rules are the rules and we all have to abide by that." 858 So. 2d at 145.

Despite their lack of diligence and strict compliance, Plaintiffs nevertheless argue on appeal that "good cause" exists for two reasons. First, they allege that ongoing good faith settlement negotiations excuse the failure of service. Second, they imply that misconduct on the part of Lowe's attorney constitutes good cause. As discussed below, each of these arguments is legally and factually inapt. Consequently, the trial court's determination that Plaintiffs have not demonstrated good cause should be affirmed.

A. In *Holmes v. Coastal Transit Authority*, this Court held that settlement negotiations are not good cause for a plaintiff's failure to make timely service.

In their brief, Plaintiffs assert that "settlement negotiations coupled with informal discovery are considered good cause under Rule 4." This statement is incorrect. To the contrary, the opposite is true. Under Mississippi law, settlement negotiations are not sufficient to show good cause. Plaintiffs' attempts to distinguish the controlling case law for this proposition are unpersuasive.

The leading case discussing the role of settlement negotiations in the "good cause" inquiry is *Holmes v. Coastal Transit Authority*, 825 So. 2d 1183 (Miss. 2002). There, this Court directly rebuffed the plaintiff's argument that "by engaging in discovery and settlement negotiations, [defendant] improperly lulled him into believing it had accepted service . . . . therefore, the trial court should have permitted 'out of time' service." *Id.* at 1186. Although noting that several other jurisdictions and authorities recognized settlement negotiations as "good cause," the Court rejected that line of reasoning. *Id.* Instead, the Court found that "good faith negotiations do not constitute good cause for failure to effect timely service of process under M.R.C.P. 4(h)." *Id.* at 1186-87. Without this rule, the Court observed, "Plaintiffs would have no incentive to comply with the 120 day limit [because] they could always find shelter from the rule by claiming that they had begun negotiations in good faith." *Id.* at 1186. Participation in good faith negotiations in no way impedes a plaintiff's ability to make service, nor does it "undermine the plaintiff's good faith." *Id.* at 1187. The fact that other jurisdictions have reached a different conclusion is irrelevant where this Court has expressly rejected those cases.

In an attempt to distinguish the unequivocal holding in *Holmes*, Plaintiffs contend that because the plaintiff in that case attempted service on the defendant via U.S. Mail, there was no evidence that the defendant ever saw the Complaint. In this case, the Plaintiffs argue that attorney Adcock saw the complaint prior to service on Lowe's registered agent. This factual distinction however, plainly has nothing to do with the *Holmes* Court's determination regarding

the role of settlement negotiations. *See Holmes*, 815 So. 2d at 1186-87. Whether counsel saw the actual Complaint has no bearing on his ability to engage in negotiations and no effect on whether those negotiations constitute good cause for the failure of service. Any difference in the facts of *Holmes* and this case are legally inconsequential.

Likewise, this Court's decision in *Stutts v. Miller* supports Lowe's position that good cause does not exist here. 37 So. 3d 1 (Miss. 2010). In *Stutts*, this Court refused to find good cause even though the plaintiff could not locate the defendants despite several efforts. *Id.* The Court concluded that a diligent plaintiff would have sought an extension of time if she was genuinely unable to locate defendants after significant effort. *Id.* at 6. Here, there is no dispute that Plaintiffs knew where Lowe's agent for service was located. (R. 6, 15, 17, 114) In fact, Plaintiffs obtained a summons issued to the correct authorized agent. Further, Lowe's did not evade service or otherwise relocate its authorized agent during the pendency of the action. A diligent Plaintiff would have at least attempted to serve Lowe's registered agent within the statute of limitations.

In a vain effort to distinguish *Stutts*, Plaintiffs again point to the ongoing settlement negotiations in this matter. Controlling case law, however, undercuts Plaintiffs' claim that these negotiations in any way strengthen their position. This Court maintains that a plaintiff attempting to establish good cause must, at minimum, show at least as much as would be required to prove excusable neglect, "as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice." *Holmes*, 815 So. 2d at 1186. Outside of their legally deficient arguments concerning settlement negotiation, Plaintiffs have failed to produce evidence of excusable neglect. Here, Lowe's agent for service was known and available at all times. Plaintiffs' failure to complete service is nothing more than "simple inadvertence," which does not constitute "good cause" under prevailing law.

B. Plaintiffs' allegations of misconduct stem from a series of unsupported factual allegations and are thus not proper before this Court.

Plaintiffs also complain that Lowe's alleged "misleading conduct" should be construed as "good cause" for the failure of timely service. This argument is both factually and legally flawed.

First, and most importantly, Plaintiffs have produced no proper evidence of "misleading conduct." To the extent that Plaintiffs again contend that Lowe's participation in settlement negotiations was "misleading," that argument is without merit. Further, Plaintiffs frequently cite as fact an affidavit filed by their own counsel containing allegations unsupported by the record evidence. (R. 88-91) For instance, Plaintiffs' contention that attorney Adcock received, and then lost, the Complaint is misleading. (R. 96) While Adcock did inform Plaintiffs' counsel that no copy of the Complaint was in his files, he never claimed to have misplaced it. (R. 96) In fact, Adcock stated in his letter of January 5, 2010 that Plaintiffs counsel should "let [him] know when Lowe's is served so that we may file an answer. (R. 96) All the record demonstrates is that Adcock never mentioned the Complaint until after the time for service had expired. (R. 96) The proper evidence in the record does not support Plaintiffs' factual allegations.

Further, the argument that Lowe's somehow misled Plaintiffs and thereby delayed service is specious. The record demonstrates that Adcock expressly informed Plaintiffs' counsel that Lowe's would not agree to any further tolling agreements and advised Plaintiffs to move forward. (R. 94, 96) The fact that Lowe's continued to negotiate with Plaintiffs after the Complaint was filed did not alter their obligation to complete timely service. In fact, the most telling aspect of Lowe's behavior is that it agreed to three tolling agreements in a good faith attempt to resolve this case. (R. 12, 30, 31) There is no credible evidence that Lowe's ever misled Plaintiffs concerning this intention.

Further, from a legal perspective, Plaintiffs are not entitled to the relief they seek, even if they could establish some sort of misconduct by Lowe's. The Court in *Holmes* quoted the very treatise on which Plaintiffs rely for this argument:

> good cause is likely (but not always) to be found when the plaintiff's 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.

815 So. 2d at 1186 (quoting 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1137, at 342 (3d ed. 2000)). While this standard does permit – and not require – good cause to be found where a defendant has engaged in misleading conduct, it also states that this conduct alone is not enough. A plaintiff must still behave diligently in order to be entitled to any relief. A single, defective attempt at service by leaving a complaint on an attorney's doorstep when plaintiff knew the identity and location of defendant's registered agent for service of process cannot legitimately be construed as "diligence." In short, the Plaintiffs bore the burden to actively pursue service, regardless of Lowe's actions. They did not do so. Both the facts and law in this case confirm that the trial court did not abuse its discretion in refusing to find "good cause."

CONCLUSION

Binding decisions of this Court establish that service was not proper. Here, Plaintiffs failed to serve Lowe's authorized agent in an appropriate manner. Further, Plaintiffs' failure to serve is not excused by ongoing settlement negotiations, or by any other unfounded factual allegations. Accordingly, Lowe's respectfully requests that this Court affirm the trial court's dismissal of this matter with prejudice.

Respectfully submitted this the 16th day of May, 2011.

By: _____
JAMES H. HEIDELBERG

James H. Heidelberg, MSB [redacted]
Jessica M. Dupont, MSB [redacted]
Heidelberg, Steinberger, Colmer & Burrow, P.A.
Post Office Box 1407
711 Delmas Avenue
Pascagoula, MS 39568-1407
Telephone: 228-762-8021
Facsimile: 228-762-7589

Ken R. Adcock, MSB [redacted]
Adcock & Morrison, PLLC
Post Office Box 3308
Ridgeland, MS 39158
Telephone: 601-898-9887
Facsimile: 601-898-9860

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the foregoing Brief of Appellee, Lowe's Home Centers, Inc. to:

Chuck R. McRae, Esq.
Attorney at Law
416 East Amite Street
Jackson, MS 39201
email: chuck@msjustice.net
Plaintiffs' Attorney

Hon. Kathy King Jackson
Jackson County Circuit Court
Post Office Box 998
Pascagoula, MS 39568

THIS, the 16th day of May, 2011

JAMES H. HEIDELBERG

Appendix 1

Chronology of Events

May 5, 2006	Plaintiff alleges he was injured at Lowe's in Pascagoula, Mississippi
May 4, 2009	Tolling Agreement # 1 is executed by the parties, extending the statute of limitations for filing suit from May 5, 2009 to June 1, 2009
May 29, 2009	Tolling Agreement # 2 is executed by the parties, extending the statute of limitations to July 1, 2009
July 1, 2009	Tolling Agreement # 3 is executed by the parties, extending the statute of limitations to July 31, 2009
July 27, 2009	Plaintiffs file a Complaint in the Circuit Court of Jackson County, Mississippi
August 3, 2009	A Summons is issued by the Circuit Clerk to the Plaintiffs' attorney and addressed to Lowe's registered agent for service: Corporation Service Company, 506 South President Street, Jackson, Mississippi, 39201
November 24, 2009	The 120-day deadline for proper service expires
November 28, 2009	The statute of limitations expires
January 20, 2010	Lowe's Home Centers, Inc., through its registered agent for service, is served with process 176 days after the Complaint was filed, and 56 days after the expiration of the three-year statute of limitations
February 10, 2010	Lowe's files its Answer, including its defense that the Plaintiffs' claim is barred by the statute of limitations
November 2, 2010	Plaintiffs execute a "Proof of Service" purportedly showing that Lowe's attorney, Ken Adcock, was served on August 6, 2009.
November 3, 2010	The "Proof of Service" alleging that Adcock was served on August 6, 2009 is filed with the clerk of the Circuit Court nearly 15 months after the alleged service.