IN THE SUPREME COURT OF MISSISSIPPI

ARTHUR GERALD HUDSON AND LINDA S. HUDSON — **APPELLANTS**

VS. — **CASE NO. 2010-TS-01958**

LOWE'S HOME CENTERS, INC. — **APPELLEE**

REPLY BRIEF OF APPELLANTS ARTHUR GERALD HUDSON AND LINDA S. HUDSON

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULE/TREATISES:

STATEMENT OF ISSUES

1. Service was proper based on the Admissions of Lowe's Home Center's Inc. that Ken Adcock was an authorized agent for service and could accept Service on Lowe's behalf.

2. Settlement Negotiations Coupled with Informal Discovery is Good Cause under Rule 4.

STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to M.R.A.P. 34(b), Appellant again requests that oral arguments be heard in this matter. Due their complex nature, the Court's consideration of the issues presented by this appeal may be assisted or advanced by the presence of the parties before the Court to comment upon the issues and respond to any inquiries concerning the circumstances in this case and why these facts differ from the cited cases. Even though Lowe's agent and attorney, Ken Adcock, has never responded to the appellant attorney's affidavit as the facts, the Court may want Adcock to attend and respond.

SUMMARY OF THE ARGUMENT

Service was properly completed when McRae served a copy of the Complaint to Adcock, an authorized agent for Lowe's. McRae was informed by Lowe's that Adcock had been employed to represent them and would serve as their "spokesperson" in this matter. Adcock's authority to receive service was implied from his established relationship with Lowe's and was confirmed and admitted in their Answer filed on February 8, 2010. "Although authority to accept process need not be explicit, it must be either expressed or implied from the type of relationship that has been established between the defendant and the alleged agent." 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1097 (3d. ed.). At the request of Adcock, he advised that the suit needed to be filed.

On or around August 6, 2009, Plaintiff's counsel filed and served a copy, via hand delivery, of the Complaint to Adcock at his office located at 199 Charmant, Suite 1, Ridgeland, Mississippi. R. at 123. A "domestic corporation" may be served by delivering a copy of the summons to any authorized agent to receive service of process. *Tucker v. Williams*, 7 So. 3d 961, 965 (Miss. App. 2009). Therefore, McRae's service of process on Adcock, an authorized agent of Lowe's, was proper.

The extensive informal discovery and settlement negotiations should constitute "good cause" as to the postponement of service of process. Counsel for the Defendant, was in possession of the complaint for a majority of the settlement negotiations. Further counsel for the Defendant had the advantage of conducting informal discovery, for determining who was the forklift operator, liability, damages, and etc., under the mask of aiding settlement negotiations. For these reasons the case at hand is distinguished from *Holmes v. Coastal Transit Authority*, 815 So.2d 1183 (Miss. 2002), and the good faith settlement negotiations should constitute "good cause" for Rule 4(h) purposes.

ARGUMENT

I. Service was proper based on the Admissions of Lowe's Home Center Inc. that Ken Adcock was an implied authorized agent for service and could accept service on Lowe's behalf.

Opposing counsel's authority to accept process was implied through his established relationship as counsel for Lowe's. Plaintiff had reason to believe that opposing counsel had been appointed authority to receive process when Lowe's employed opposing counsel to represent them on all issues in the case at hand. Because opposing counsel had authority to accept process, service of process should be considered complete.

An agent's authority to accept process does not need to be explicit, but it must either be expressed or implied from the type of relationship established between the defendant and the alleged agent. 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1097 (3d. ed.). The alleged agent or "even the defendant's attorney probably will not be deemed an agent appointed to receive process absent a factual basis for believing that an appointment of that type has taken place." *Id.* "To serve a domestic corporation, a plaintiff must serve "an officer, managing or general agent, or ... any other agent authorized by appointment or by law to receive service of process." *Tucker v. Williams*, 7 So.3d 961, 965 (Miss. App. 2009).

Defendant alleges that the manner of service was improper according to *Tucker*. Rule 4 merely says that to serve a domestic corporation one must serve, "an officer, managing or general **agent, or ... any other agent authorized by appointment** or by law to receive service of process." M.R.C.P. 4(d)(4) (emphasis added). Lowe's and opposing counsel held himself out to be an authorized agent through his established relationship with the Defendant and service of process was proper when Plaintiff's counsel served a copy of the Complaint opposing counsel. Further, Defendant's admitted in their Answer filed on February 8, 2010, that Adcock was their legal representation and could be served process at his office in Ridgeland, Mississippi. Plaintiff's counsel clearly did not rely on this statement as it was filed after the service to Adcock, but service was verified by this admission in their Answer. Defendant has yet to file an amended Answer denying the allegations of paragraph 1(c) of the Complaint. All of these events taken separately might not be adequate factual basis to lead Plaintiff's to believe Adcock was an agent for Lowe's; however, these events, taken together in light of the working relationship between the attorneys, is sufficient. Therefore, it is reasonable to believe that Adcock is an authorized agent to accept service of process.

Counsel for Plaintiff had been informed that opposing counsel would be representing Lowe's and, for all intents and purposes, would be their "spokesperson" in this matter. Opposing counsel began settlement negotiations and began investigating the case to determine liability and damages. During negotiations, three tolling agreements were agreed to and signed by both opposing counsel and counsel for Plaintiff. After last tolling agreement opposing counsel advised counsel for Plaintiff to file suit. Since counsel for Hudson had been informed prior to the filing of the Complaint that Adcock was the "spokesperson" and attorney for Lowe's and given the ongoing settlement negotiations and informal investigations between the attorneys, it was believed that opposing counsel had been appointed an authorized agent to receive process for Lowe's, and so stated in the Complaint filed in August 2009.

While placement of the Complaint on Adcock's doorstep was not ideal, Lowe's devotes much of their argument on the premise that this was the only occasion Plaintiff's counsel submitted the Complaint to Adcock. However, as stated in the Appellant's Brief, Adcock was provided, via electronic mail, with a copy of the Complaint on other occasions, upon his request. Given the informal working relationship between the attorneys, McRae fulfilled any request for additional copies of the Complaint as well as any medical records Adcock requested in an effort to further any settlement possibility, helping establish the actual date of the incident and the driver of the forklift. The Court in *Tucker v. Williams* did conclude that leaving a summons and complaint on the property of a corporation is not appropriate; however, that was not the case here. McRae delivered a copy to an attorney who, at the time, he had a good, civil working relationship with, at his office during the lunch hour. In the subsequent weeks after this, he continued working with Adcock, fulfilling all requests for records and documents. After serving Lowe's at Adcock's request in January of 2010, because he did want to get crossed haired with

his client on discovery, Plaintiff's counsel received an Answer, which verified that Adcock could be served, and prepared to start formal discovery.

In *Tucker*, Plaintiffs received no acknowledgement that the Defendants received the Complaint. 7 So.3d 961 at 964. There was no evidence in that case that the individual served in *Tucker* had any authority to accept service on behalf of the Defendant. *Id* at 966. The Plaintiffs received no Answer to their Complaint as well. *Tucker* is quite distinguishable from the case at hand. McRae had an ongoing, working relationship with opposing counsel and relied on the civility and working relationship that is encouraged between opposing attorneys. Adcock was in possession of the Complaint and discovery requests, and the case was moving forward until Defendant filed their Motion to Dismiss Based on Statute of Limitations.

The simple and basic conclusion to be drawn is that counsel for the Plaintiff was in communication with Adcock prior to drafting and filing the Complaint. Given the working relationship and communication, he reasonably believed that opposing counsel was an authorized agent given the fact that he was the "attorney of record and spokesperson" and so stated in the Complaint. He followed through by delivering a copy to opposing counsel and no further issue regarding service was made as negotiations continued. Another copy of the Complaint was sent in November of 2009 when counsel opposite stated that he could not find his copy. R. at 89. Later, settlement negotiations ended, an Answer was filed, and Plaintiff began discovery requests without any issues being raised regarding service until the Motion to Dismiss was filed in March of 2010.

II. Settlement Negotiations coupled with Informal Discovery Are Considered Good Cause under Rule 4.

Due the extensive nature of the informal discovery and settlement negotiations in this case, the Court should consider the conduct to be "good cause" as to the postponement of service

of process. The requirement of service of process pursuant to M.R.C.P. 4 is required to ensure that a Defendant is fully aware of the pending litigation and put said Defendant on fair notice of litigation. "Good cause" should be established by the good faith settlement negotiations, where opposing counsel was in possession of the Complaint and was able to conduct informal discovery under the mask of aiding settlement.

Plaintiff's counsel was contacted by Lowe's, prior to the filing of the suit, instructing him to contact their attorney, Ken Adcock, and commence settlement negotiations. Defendant's counsel asked Plaintiff to delay service after the Complaint was filed, as settlement seemed to be a desirable option for both parties at that stage. Counsel for the Plaintiff served Adcock a copy of the Complaint, filed in July 2009, via hand-delivery on or around August 6, 2009. During negotiations, opposing counsel had to conduct his own thorough investigation and requested at different times documents for review. Opposing counsel was having difficulties identifying who the forklift operator was and seemed to be confused as to the date the incident occurred, and he needed Plaintiff's medical records. In November of 2009, opposing counsel requested another copy of the Complaint, Advising Plaintiff he had lost his copy. And once again opposing counsel requested another copy of the Complaint in January, 2010. Notice to the Defendant--the function of Rule 4 and service of process--was achieved upon service of the Complaint to Adcock. Defendant blocked the taking of deposition of Lowe's in North Carolina concerning whether Adcock had forwarded the Complaint to them, and surely Lowe's was monitoring their agent. As the Defendant has not been prejudiced by the informality of the service to Adcock, the Plaintiff should not be precluded from proceeding with their cause of action.

Defendant alleges that there was only one attempt to serve Lowe's, and that there was no diligence demonstrated by the Plaintiff. "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). Plaintiff served opposing counsel with a copy of the Complaint on three separate occasions. Opposing counsel was personally served by counsel for Plaintiff on or around August 6, 2009. Opposing counsel was then served another copy of the Complaint by counsel for Plaintiff in November 2009, and January 2010. Plaintiff demonstrated diligence in attempting to serve process by serving opposing counsel on three separate occasions.

Defendant relies on the Court's decision in *Holmes v. Coast Transit Authority*, that first settlement negotiations do not constitute "good cause" for failure to make timely service. The Court in *Holmes*, adopted the rationale that negotiations do not constitute good cause for failure to effect service under M.R.C.P. 4(h). *Holmes v. Coastal Transit Authority*, 815 So.2d 1183, 1187 (Miss. 2002). However, the case at hand can be distinguished from *Holmes*, regarding the matter of settlement negotiations. There was only one attempt to serve the governmental defendant in *Holmes* and this attempt was made via United States Mail. There was no acknowledgement that the defendant in *Holmes* had even seen the Complaint. *Id* at 1184. Here, counsel for Plaintiff delivered a copy to opposing counsel on one occasion at this office who stated he would review it. Later, an additional copy of the Complaint requested by defense counsel was provided in November of 2009 and January of 2010. R. at 88-89, 96. Here opposing counsel was given a copy of the Complaint on three separate occasions. The case at hand is distinguished from Holmes, in that diligence in attempting to serve process was demonstrated by the three times opposing counsel was served a copy of the Complaint.

After the Complaint was filed, active settlement negotiations and informal discovery continued as evidenced by correspondence and phone conversations between McRae and

Adcock. Lowe's was effectively put on notice that the Complaint had been file when, with due diligence, McRae served Adcock via hand-delivery a copy of the Complaint. At a minimum, this should be considered constructive service, whereby putting Adcock on notice that the lawsuit would commence if settlement could not be reached. Further, it was defense counsel, prior to the end of the last tolling agreement that told counsel for Plaintiff to go ahead and file the lawsuit to take it "to the next level." R. at 89. Discovery and negotiations were active and open well past the November 28, 2009 statute of limitations as proposed by the Defendant in their Motion to Dismiss.

On or around January 5, 2010, the attorneys agreed that settlement could not be reached at this stage and determined that Hudson should also serve process on Lowe's Home Center, Inc., as Adcock did not want to get crossed haired with his client. R. at 96. While it is Hudson's belief and contention that Lowe's and their counsel were already on notice and had been effectively served, Lowe's was served on January 20, 2010 as per defense counsel's request as he did not wish to be "crossed up" with his client. R. at 13. This was considered to be courtesy service as counsel for Plaintiff was under the belief that Adcock had already been served. Plaintiff detrimentally relied on that Lowe's was served and was working towards resolving the lawsuit.

Settlement negotiations have been considered as "good cause" under their rules of civil procedure regarding service of process, by many other jurisdictions. (See *Scrimer v. Eight Judicial Dist. Ct.*, 998 P.2d 1190, 1195, *Assad v. Liberty Chevrolet, Inc.*, 124 F.R.D. 31 (D.R.I. 1989), *Carlton v. Wal-Mart Stores, Inc.*, 621 So.2d 451, 455 (Fla. 1st Dist. App. 1993). Further, settlement negotiations are encouraged in good faith attempt to bring about an amicable resolution and should be considered as a valid basis for good cause. Here the extensive nature of

the negotiations and informal discovery, along with the fact opposing counsel was given three copies of the Complaint should constitute "good cause" for Rule 4(h) purposes.

However, if this Court cannot regard this type of conduct as good cause for delay, the settlement negotiations the counsel for the Plaintiff relied upon have been obscured in bad faith. Active settlement negotiations and informal discovery were continued by the Defendant into January 2010 only to file a Motion to Dismiss on the grounds of a statute of limitations in March of 2010. Lowe's was in receipt of Summons, Complaint and Discovery Requests – requests that were never answered. This blankets all prior attempts at settlement in a cloud of bad faith with the sole purpose to delay litigation.

In order to promote an agreeable resolution, Plaintiff's counsel fulfilled any and all requests from the defense with regards to documents, even agreeing to allow defense counsel to depose Hudson's physicians. A leading treatise, cited within *Holmes*, states that good cause is likely to be found when a plaintiff's failure to effect service within 120 days is a result of ". . . the defendant has evaded service of process or *engaged in misleading conduct*, the plaintiff has acted diligently in trying to effect service, or there are *understandable mitigating circumstances . . .* " 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §1137, at 342 (3d ed. 2000) (emphasis added). Throughout the entire process, defense counsel portrayed that he was nurturing a settlement at the cooperation of the Plaintiff, doing an informal investigation by stating that he could not requesting copies of the Complaint and other documents customarily requested in discovery. In reliance of this and history of a cordial working relationship with opposing counsel, McRae moved forward with the discovery and negotiations in order to resolve the lawsuit, after delivering the Complaint.

An interpretation of M.R.C.P. 4 should encourage civility and good relationships between the opposing parties, support judicial economy, and promote settlement. This was Plaintiff counsel's goal when he continued negotiations. To his detriment, counsel for the Plaintiff kept all avenues of compromise open with opposing counsel in reliance on the attempt to resolve the underlying action. Plaintiffs are held to many time restrictions under the Rules of Civil Procedure and, admittedly, Rule 4 is no exception. However, a strict interpretation of Rule 4(h) in light of the facts presented in the instant case would be contrary to fundamental fairness and public policy. Defense Counsel knew that his client and he were in a lawsuit. If defense counsel had never been provided a copy of the Complaint and continued active and ongoing settlement negotiations as well as informal discovery with the Plaintiff, this point would be moot. However, Plaintiffs should not be punished attempts to resolve this matter in an amicable and civil manner.

CONCLUSION

In conclusion, Hudson has demonstrated that, by the Lowe's own admission and relationship with opposing counsel, their counsel of record was authorized and agreed to accept service of process. Lowe's informed counsel for Plaintiff that opposing counsel would be their "spokesman" in this matter. Any and all requests for documents were fulfilled as defense counsel continued with informal discovery and investigation. There was no reason for counsel for Hudson to question whether or not Lowe's had been served. Defense counsel was fully informed and on notice of the lawsuit and both attorneys had moved forward with negotiations and discovery in the lawsuit. Defendant has yet to file an amended Answer denying the allegations of paragraph 1(c) of the Complaint. Until the filing of the Motion to Dismiss, there had been no

question as to service of process or any prejudice to Lowe's. It now seems as if the defense counsel's conduct was merely to delay the entire process.

Alternatively, if service of process as to their attorney should be considered improper, Hudson urges this Court to consider the active and ongoing settlement negotiations as well as informal discovery and investigation as good cause pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure. This case distinguishes itself from *Holmes*, in that the opposing counsel was served a copy of the Complaint on three separate occasions. Defendant engaged in misleading conduct during negotiations with the purpose to delay litigation. Furthermore, Appellants ask that this Court reverse the trial court's dismissal with prejudice and allow this matter to proceed.

Respectfully submitted this the 5th day of July, 2011.

ARTHUR GERALD HUDSON AND LINDA HUDSON

By: _____

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CERTIFICATE OF SERVICE

I, Chuck R. McRae, do hereby certify that I have this day mailed via United States Mail, postage fully prepaid, a true and correct copy of the foregoing document to:

Ms. Kathy Gillis, Clerk (via hand delivery)
Mississippi Supreme Court
Post Office Box 117
Jackson, MS 39205

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