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

BRIEF OF APPELLANTS ARTHUR GERALD HUDSON AND LINDA S. HUDSON

ORAL ARGUMENT REQUESTED

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SUPREME COURT NO. 2010-TS-01958

VS. — **CAUSE NO. 2009-00184(2)**

LOWE'S HOME CENTERS, INC. — **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.

1. Arthur Gerald Hudson and Linda Hudson, Appellants
2. Chuck McRae, Attorney for the Appellant
3. Lowe's Home Centers, Inc., Appellee
4. Ken Adcock, Attorney for the Appellee
5. James Heidelberg, Attorney for the Appellee
6. Honorable Kathy Jackson, Circuit Court Judge for Jackson County

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to M.R.A.P. 34(b), Appellant 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.

STATEMENT OF THE CASE/OPERATIVE FACTS

Appellants, Arthur Gerald Hudson, and Linda S. Hudson initiated the underlying action following an injury caused by a forklift operated by an employee of Lowe's Home Center, Inc. in Pascagoula, Mississippi. On May 5, 2006, while shopping at Lowe's Home Center, Inc., Arthur Gerald Hudson was hit with a forklift as it came around the corner at a high rate of speed. Immediately following the accident, he began experiencing dizziness and pain in the back of his neck that radiated into the back of his head like an electric shock as well as injuries to his knee. Due to the accident, he continues suffering incapacitated, episodic dizziness and near syncope and also nausea, he is unable to carry out his daily routine activities as a result of the impact with the forklift. Linda S. Hudson has suffered loss as a result of her husband's injuries including a diminished wage earning capacity, loss of services, loss of consortium, and enjoyment of life.

Counsel for the Plaintiff, Chuck McRae, and counsel for the Defendant, Ken Adcock began settlement negotiations. McRae had been informed that Adcock would be representing Lowe's and, for all intents and purposes, would be their "spokesperson" in this matter. Lowe's

had instructed McRae that Adcock had been employed to represent them and waived the statute of limitations by thirty days with an extension. To prohibit the expiration of the statute of limitations, three tolling agreements were agreed to and signed by both McRae and Adcock. The last of these three tolling agreements extended the statute of limitations to July 31, 2009. McRae was informed by Adcock that this would be the last tolling agreement. R. at 30-33. Adcock advised McRae to file the lawsuit and take it "to the next level."

On July 27, 2009, Hudson filed his Complaint in the Jackson County Circuit Court against the Appellee, Lowe's Home Stores, Inc. In fact, the Complaint states in Paragraph C that ". . . counsel of record for Lowe's Home Centers is Ken Adcock, Esq. and he may be served with process at 199 Charmant, Suite 1, Ridgeland, Mississippi 39158." R. at 6. Later, when Adcock file Lowe's Answer, it was admitted that Adcock was proper to be served on behalf of the Defendant. R. at 18.

During all periods in which the tolling agreements were effective, Adcock asked for documents which he believed would assist him in negotiating a settlement. McRae fulfilled every request for documents and even agreed that Adcock could speak to Hudson's doctors. Essentially, Adcock was allowed to conduct informal discovery behind the façade of "settlement negotiations." R. at 98-99.

On or around August 6, 2009, Plaintiff's counsel 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. Various documents were requested informally by Adcock during this time period. In November of 2009, he advised that he had lost this copy of the Complaint and requested another copy. R. at 89.

Settlement negotiations and informal discovery and investigations continued until January 5, 2010 when Adcock officially ended all negotiations following a telephone conversation with McRae. Adcock requested that McRae serve Lowe's again as he did not want to be "crossed up", or in tensions with his client. R. at 89. Further, in a correspondence stating the same, Adcock again states he cannot find his copy of the Complaint and asked McRae to send a copy to him. R. at 96.

On January 20, 2010, Lowe's was personally served process through their agent, Corporation Service Company, 506 South President Street, Jackson, Mississippi 39201. R. at 13.

On February 8, 2010, Lowe's filed their Answer and Defenses to the Complaint. In the first numbered paragraph of their Answer, Lowe's admits to the allegations in paragraph 1(c) of the Complaint which asserts that Adcock can alternatively be served process as their legal representative. R. at 18.

On March 25, 2010, Lowe's filed a Motion to Dismiss Based on Bar of Statute of Limitations with Supporting Authorities which alleged that the statute of limitations expired on November 28, 2009. R. at 26.

On August 12, 2010, a Notice of Appearance of James H. Heidelberg on behalf of Lowe's was filed. R. at 62. After Responses and several Motions were filed with regard to this Motion to Dismiss were filed, this matter was brought up for hearing before the Honorable Kathy Jackson on November 3, 2010.

On November 15, 2010, an Order of Dismissal was issued, dismissing the claim against Lowe's with prejudice. R. at 127.

SUMMARY OF THE ARGUMENT

This action was filed in July of 2009 In Jackson County Circuit Court following three tolling agreements and attempted settlement negotiations between McRae and Adcock. Shortly after the filing of the Complaint, McRae served a copy of the Complaint to Adcock, leaving a copy outside his office next to the door.

Settlement negotiations continued and informed investigations by Adcock had been ongoing. In their Answer filed on February 8, 2010, Lowe's admitted that Adcock was their legal representation and could be served process at his office in Ridgeland, Mississippi. Therefore, pursuant to Rule 8 of the Mississippi Rules of Civil Procedure, McRae had provided a copy of the Complaint to an admitted agent of Lowe's Home Centers, Inc. By their own admission, Adcock could be served process and, until their filing of the Motion to Dismiss Based on Bar of Statute of Limitations, had no objections to Adcock accepting service on behalf of Lowe's. Therefore, the contention that Adcock could not be served, which was relied both by Lowe's and the trial court, cannot overcome the admissions made in their own Answer.

Furthermore, settlement negotiations and informed investigations were active and ongoing, even before the filing of the Complaint. McRae furnished, at Adcock's request, many medical documents and other discoverable material in order to aid and encourage settlement. McRae served Adcock, the delay in serving the client was at the request of Adcock while they continued attempts at settlement. While established case law in Mississippi holds that good faith settlement negotiations, the matter at hand goes past just mere good faith settlement negotiations.

As one of the leading cases regarding "good cause" under Rule 4 of Mississippi Rules of Civil Procedure, *Holmes v. Coastal Transit Authority*, 815 So.2d 1183 (Miss. 2002) seems to be

somewhat similar to the matter at hand; however, it can be distinguished from the case at hand. Further, any reliance on the more recent case *Stutts v. Miller*, 37 So.3d 1 (Miss. 2010) decided by this Court is also be distinguishable from the case at hand. M.R.C.P 8 only requires that the pleadings put the Defendant in an action on notice, hence the development of "notice pleading." In neither of these Rule 4(h) cases has the counsel for the Defendant been in possession of the Complaint most of the settlement negotiations. Further, counsel for the Defendant in these precedent cases has not had the further advantage of conducting informal discovery under the mask of aiding settlement. At some point, good faith settlement negotiations should cross into "good cause" for Rule 4(h) purposes.

STANDARD OF REVIEW

A trial court's decision to grant or deny a motion to dismiss is reviewed *de novo*. *Scaggs v. GPCH-GP, Inc.*, 931 So.2d 1274, 1275 (Miss. 2006). However, this Court has given discretion to the trial court in findings of fact regarding the existence of good cause with regards to delay in service of process pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure. *Johnson v. Thomas ex rel. Polatsidis*, 982 So.2d 405 (Miss. 2008). "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 determination." *LeBlanc v. Allstate Ins. Co.*, 809 So.2d 674, 676 (Miss. 2002). "Where such discretion is abused or is not supported by substantial evidence, this Court will reverse." *Long v. Mem'l Hosp. at Gulfport*, 969 So.2d 35, 38 (Miss. 2007).

ARGUMENT

I. Service of Process was Proper as to Lowe's Home Centers, Inc. Based on their Admissions in their Answer to the Complaint

Because Lowe's admitted in their Answer that opposing counsel could be served with process, service of process should be considered complete. Opposing counsel was authorized by this admission to accept service of process on behalf of Lowe's.

The rule regarding responsive pleading is well-established. Rule 8 of the Mississippi Rules of Civil Procedure states that:

> **Defenses: Form of Denials.** A party shall state in short and plain terms his defenses to each claim and shall admit or deny the averments upon which the adverse party relies. . .

M.R.C.P. 8(b). In a properly numbered and formatted Complaint, the Defendant must admit or deny to the best of their knowledge and ability each averment set forth.[1] Essentially, proof is only needed when it is a contested issue—when a fact or averment is admitted, there is nothing to contest.

The Complaint was filed on July 27, 2009 with the Circuit Court of Jackson County, Mississippi. R. at 6. Pursuant to Rule 8(a) of the Mississippi Rules of Civil Procedure, the Complaint adhered to setting forth short and plain statements showing Hudson's entitlement of relief in clearly numbered paragraphs. M.R.C.P. Rule 8(a). In paragraph 1(c) of the Complaint, Hudson sought to establish the parties and where proper service of process may be completed. This paragraph included the statement that service of process may be delivered to Ken Adcock at his office. R. at 6. Since counsel for Hudson had been informed prior to the filing of the

[1] This practice is so entrenched in procedure that the best summation can be found in a very early case, *Parkhurst v. McGraw*, 1852 WL 2002, 3 (April Term 1852) which held, simply, that facts admitted by the pleadings cannot be changed or challenged by the proof

Complaint that Adcock was the "spokesperson" and attorney for Lowe's and given the ongoing settlement negotiations and informal investigations between the attorneys, this addition was seemingly appropriate.

On or around February 8, 2010, Lowe's filed their Answer and Defenses. In paragraph one, Lowe's admitted the facts set forth in paragraph 1(e) of the Complaint by stating clearly that "Defendant admits the allegations of paragraph 1(e)." R. at 18. At this point, counsel for Plaintiff had already hand-delivered a copy of the Complaint to Adcock on or around August 6, 2009 and in January of 2010, Adcock had requested that McRae "go ahead and serve" Lowe's as well so that he did not want to have tensions with his client. R. at 90. Although he felt that this was odd given that counsel for Defendant had already been in possession of a copy of the Complaint, Lowe's was served on January 20, 2010. R. at 4.

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 felt it sufficient to include opposing counsel as a possibility for satisfying service of process in the Complaint as he was the "attorney of record and spokesperson." 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.

Lowe's heavily relied on the "fact" that their attorney never agreed nor was authorized to accept service on behalf of his client; however, the answer says otherwise. Furthermore, the trial court, in the Order of Dismissal, stated that Hudson had pointed to "nothing in the record beyond agreement showing he [Adcock] had the authority to accept it" This issue was addressed in the lower court hearing to ensure that the trial court was aware that Lowe's had admitted Adcock could be served process in their Answer. R. at 9, Vol. Pursuant to the Rules of Civil Procedure, the admissions of a Defendant must be admitted. If Lowe's did not want their attorney to have any authority to accept service of process, it should have been reflected in their Answer. Furthermore, it was Lowe's that telephoned Plaintiff's counsel and stated that Adcock would be the "spokesperson" and attorney representing them on this matter.

Admissions made by Lowe's in their Answer should be considered admitted therefore allowing service to their attorney to be deemed proper. All communication and inquiries were directed to Lowe's attorney, even prior to the filing of the Complaint. No issue was raised prior to March of 2010 regarding the service of process after Lowe's had answered the Complaint and the Plaintiff had continued forward with the formal discovery process. Lowe's should be held to their admissions set forth in their Answer.

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

Because settlement negotiations together with informal discovery were so extensive, this conduct should be considered "good cause" as to the postponement of service of process.

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 day 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.

M.R.C.P. 4(h) (emphasis added). 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. *See* Comment to M.R.C.P. 4. However, if service is not deemed complete, it is the burden of the Plaintiff to show why service could not be completed within the 120 days as provided in M.R.C.P. 4.

Prior to the filing of the suit, Lowe's contacted Plaintiff's counsel in order to commence settlement negotiations by instructing him to contact their attorney, Ken Adcock. Following the filing of the Complaint, Plaintiff was asked to delay service as settlement seemed to be a desirable option for both parties at that stage. Despite this request, counsel for the Plaintiff served Adcock a copy of the Complaint, filed in July 2009, via hand-delivery and the negotiations continued. Adcock had to do his own thorough investigation and requested at different times documents for review. He was having trouble on one occasion determining who the forklift operator was and seemed to be confused as to the date the incident occurred. Notice to the Defendant--the function of Rule 4 and service of process--was achieved upon service of the Complaint to Adcock. 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.

As previously discussed, Hudson contends that service of process was completed once a copy was hand-delivered to defense counsel on or around August 6, 2009, shortly after the filing of the Complaint on July 27, 2009. Further, defense counsel was supplied with additional copies

since that date. However, in the alternative, the active and continuous settlement negotiations along with the informal discovery and investigations between attorneys should be considered sufficient as "good cause" pursuant to the exception in M.R.C.P. 4.

At first glance, the Mississippi case law regarding settlement negotiations as "good cause" does not favor this argument. In *Holmes v. Coast Transit Authority*, this Court considered the use of discovery and settlement negotiations as good cause under the meaning of M.R.C.P. 4. *Holmes v. Coastal Transit Authority*, 815 So.2d 1183 (Miss. 2002). The Court adopted the rationale that negotiations do not constitute good cause for failure to effect service under M.R.C.P. 4(h). *Id* at 1187. However, looking further into the precedent case, this matter can be contrasted from *Holmes*. 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 Adcock 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. R. at 88-89. Surely, since Lowe's had informed counsel for Plaintiff that Adcock would be their attorney, he would also supply them with any documents he was given, including the Complaint. (It should also be noted that the Defendant blocked the taking of Lowe's deposition to confirm their facts.)

Recently, in *Stutts v. Miller*, this Court held that the plaintiff in that case did not establish good cause based on the affidavits submitted describing the failed attempts to serve the defendants. *Stutts v.Millier*, , 37 So.3d 1,6 (Miss. 2010). In *Stutts*, the plaintiffs did not provide enough evidence to show that good cause in delay of service of process had been reached. *Id.*

The diligence of the plaintiffs to complete service of process may not have been enough to reach good cause, but, once again, this case does not parallel the matter at hand. In good faith, counsel for the Plaintiff had entered into settlement negotiations with defense counsel prior to the filing of the Complaint on July 27, 2009. R. at 98-99. Defense counsel had been given copies of the Complaint and discoverable documents. Exhaustive settlement negotiations had been ongoing prior to and since the filing of the Complaint. Plaintiff's counsel had even proposed defense counsel conduct a deposition of Hudson's doctors.

Active settlement negotiations and informal discovery continued after the filing of the Complaint as evidenced by correspondence and phone conversations between McRae and Adcock. With due diligence, McRae served, via hand-delivery, a copy of the Complaint to Adcock effectively putting the Lowe's on notice that the Complaint had been filed. This, at a minimum, 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. 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. 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.

Many jurisdictions have considered settlement negotiations as "good cause" under their rules of civil procedure regarding service of process. (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. Parties should be encouraged, not admonished, to foster an amicable working relationship with opposing counsel and should further be able to rely on their cooperation as a promotion, not a hindrance, of justice.

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. Lowe's continued active settlement negotiations and informal discovery 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 settlement, 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 negotiations 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 settle 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. 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, their counsel of record was authorized and agreed to accept service of process. 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. 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 be considered improper, Hudson urges this Court to considered 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. Furthermore, Appellants ask that this Court reverse the trial court's dismissal with prejudice and allow this matter to proceed.

Respectfully submitted this the 15th day of March, 2011.

ARTHUR GERALD HUDSON AND LINDA HUDSON

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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:

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