

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-IA-00343-SCT

**E**

**COPIAH SCHOOL DISTRICT  
AND KENNETH FUNCHES**

**APPELLANTS**

**V.**

**CHARLES BUCKNER**

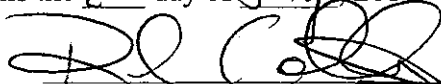
**APPELLEE**

**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 may evaluate possible disqualification or recusal.

1. Copiah County School District, Appellant
2. Kenneth Funchess, Appellant
3. Rebecca B. Cowan, Esq., Attorney for Appellants
4. Joseph W. Gill, Esq., Attorney for Appellants
5. Currie Johnson Griffin Gaines & Myers, P.A., Attorneys for Appellants
6. Charles Buckner, Appellee
7. Ramel L. Cotton, Esq., Attorney for Appellee
8. Omar L. Nelson, Esq., Attorney for Appellee
9. Morgan & Morgan, Attorneys for Appellee

SO CERTIFIED, this the 23<sup>rd</sup> day of July, 2010.



Ramel L. Cotton (MSB# [REDACTED])  
Attorney for Appellee

## **TABLE OF CONTENTS**

Certificate of Interested Persons .....	I
Table of Contents .....	ii
Table of Authorities .....	iii
Statement of the Issues .....	iv
Statement of the Case and Facts .....	v
Summary of the Argument .....	vii
Argument .....	1
Conclusion .....	7
Certificate of Service .....	9

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Harlow v. Grandma's House, Inc.</i> , 703 So.2d 73 (Miss. 1998) . . . . .	2, 4
<i>Havard v. State</i> , 911 So.2d 991, 993 (Miss. Ct. App. 2005) . . . . .	5, 6
<i>Johnson v. Thomas</i> , 982 So.2d 405, 409 (Miss. 2008) . . . . .	6

### **STATUTES**

Miss. Stat. Ann. §11-46-11 . . . . .	v, 1
--------------------------------------	------

### **RULES**

M.R.C.P. 4(h) . . . . .	v, 1, 2, 6
M.R.C.P. 59(b) . . . . .	3
M.R.C.P. 60 . . . . .	vii, 3, 7
M.R.C.P. 77(d) . . . . .	v, 1, 2, 6

## **STATEMENT OF THE ISSUES**

I. Whether the trial court abused its discretion in refusing to set aside its February 2, 2009 Order allowing Plaintiff an additional 120 days to serve Defendants.

II. Whether the trial court abused its discretion in finding “good cause” or “excusable neglect” and allowing Plaintiffs additional time to serve Defendants.

## **STATEMENT OF THE CASE AND FACTS**

On October 29, 2007 Buckner filed a complaint in the Circuit Court of Copiah County, Mississippi against Copiah County School District, Kenneth Funchess, and John and Jane Does 1-10 for an automobile accident that occurred on December 15, 2006. Buckner filed said complaint after having satisfied the notice requirement found in Miss. Stat. Ann. 11-46-11. On January 12, 2009, counsel for Buckner appeared before the Circuit Court of Copiah County on a request for an extension of time to serve the defendants. After hearing from Buckner's counsel and finding that good cause existed, the Circuit Judge granted Buckner's motion and orally expressed his intent to grant an extension of 120 days. The Circuit Judge also ordered Buckner's counsel to provide him with a proposed Order so the court could impose its ruling. Buckner's counsel provided the court with the proposed Order as requested. However, Buckner nor his counsel received a copy of the signed Order. Acknowledging his duty under M.R.C.P. 77(d) to maintain contact with the clerk's office for filings that may not have been forwarded, Buckner's counsel through persistence and regular contact with the clerk's office finally received a copy of the Order for the first time by facsimile on June 4, 2009. Although it was Buckner's first receipt of the Order, out of an abundance of caution Buckner served the complaint on the defendants on that same day. Buckner took this approach because June 4, 2009 was the 121<sup>st</sup> day from the date of the hearing and Buckner wanted to display due diligence in light of the circumstances.

On June 17, 2009 Defendant Copiah School District filed its answer and Defendant Funchess filed his answer on July 2, 2009. Defendants filed a Motion to Set Aside Order Granting Extension of Time and for Summary Judgment on June 17, 2009. Buckner responded with factual and legal argument supported by an affidavit of counsel's legal assistant describing the due diligence taken

in adherence to M.R.C.P. 77(d). The Circuit Court set a hearing on the matters. After argument from counsel and hearing live testimony from counsel's legal assistant regarding the contact maintained with the clerk's office in attempt to get a copy of the Order extending time to serve defendants, the Circuit Judge denied Defendants' Motions to Set Aside Order Granting Extension of Time and Summary Judgment. Defendants put on absolutely no testimony to support their argument. It is from these rulings that defendants appeal.

## **SUMMARY OF THE ARGUMENT**

Appellants have the burden of proving to this Court, through credible and substantial evidence, that the trial court abused its discretion in refusing to set aside its February 2, 2009 order allowing an extension of time to serve defendants. At the time this order was entered Appellants were not present and not even a party to the action. Not surprisingly, Appellants have provided this Court with absolutely no evidence that substantiates their claim that the trial court abused its discretion. Additionally, Appellants do not prove or even allege any of the bases for setting aside a previous order, as provided in M.R.C.P. 60. Therefore, because Appellants have not met their burden of showing abuse of discretion, this Court should affirm the trial court's ruling.

Appellants carry the burden regarding the second issue of proving that the trial court abused its discretion in finding good cause and excusable neglect. Here again, Appellants fail. The trial required the parties to submit briefs supporting their positions and held a hearing regarding the same. Buckner provided a detailed brief with supporting facts and law, a supporting affidavit and live testimony to support his position of good cause and excusable neglect. Defendants provided the court with a brief from counsel and absolutely no evidence either through affidavit or live testimony to support its assertion. Accordingly, Appellants are not able to prove that the trial court abused its discretion in finding that good cause and excusable neglect existed.

For these reasons this Court should affirm the findings of the trial court.

## **ARGUMENT**

### **I. Whether the trial court abused its discretion in refusing to set aside its February 2, 2009 Order allowing Plaintiff an additional 120 days to serve Defendants.**

On October 29, 2007 Buckner filed a complaint in the Circuit Court of Copiah County, Mississippi against Copiah County School District, Kenneth Funchess, and John and Jane Does 1-10 for an automobile accident that occurred on December 15, 2006. Buckner filed said complaint after having satisfied the notice requirement found in Miss. Stat. Ann. 11-46-11. On January 12, 2009, counsel for Buckner appeared before the Circuit Court of Copiah County on a request for an extension of time to serve the defendants. After hearing from Buckner's counsel and finding that good cause existed, the Circuit Judge granted Buckner's motion and orally expressed his intent to grant an extension of 120 days. The Circuit Judge also ordered Buckner's counsel to provide him with a proposed Order so the court could impose its ruling. Buckner's counsel provided the court with the proposed Order as requested. However, Buckner nor his counsel received a copy of the signed Order. Acknowledging his duty under M.R.C.P. 77(d) to maintain contact with the clerk's office for filings that may not have been forwarded, Buckner's counsel through persistence and regular contact with the clerk's office finally received a copy of the Order for the first time by facsimile on June 4, 2009. Although it was Buckner's first receipt of the Order, out of an abundance of caution Buckner served the complaint on the defendants on that same day. Buckner took this approach because June 4, 2009 was the 121<sup>st</sup> day from the date of the hearing and Buckner wanted to display due diligence in light of the circumstances.

On June 17, 2009 Defendant Copiah School District filed its answer and Defendant Funchess filed his answer on July 2, 2009. Defendants filed a Motion to Set Aside Order Granting Extension



of Time and for Summary Judgment on June 17, 2009. Buckner responded with factual and legal argument supported by an affidavit of counsel's legal assistant describing the due diligence taken in adherence to M.R.C.P. 77(d). The Circuit Court set a hearing on the matters. After argument from counsel and hearing testimony from counsel's legal assistant regarding the contact maintained with the clerk's office in attempt to get a copy of the Order extending time to serve defendants, the Circuit Judge denied Defendants' Motions to Set Aside Order Granting Extension of Time and Summary Judgment. Defendants put on absolutely no testimony to support their argument. It is from these rulings that defendants appeal.

The standard of review for a judge's ruling regarding a Motion to Set Aside a Ruling is abuse of discretion. See *Johnson v. Thomas*, 982 So.2d 405, 409 (Miss. 2008). The *Johnson* Court went further to explain that "this Court leaves to the discretion of the trial court the finding of fact on the existence of good cause or excusable neglect for delay in serving process under Rule 4(h)." *Id.* That is to say, "where such discretion is abused or is not supported by substantial evidence, this court will reverse." *Id.*

In the case *sub judice* Buckner appeared before the Circuit Court of Copiah County and made an *ore tenus* motion for an extension of time to serve defendants. After hearing argument from Buckner, the court made a determination that good cause existed for an extension of time to serve the defendants and orally granted Buckner's request.

Here the burden is upon the Appellant to show that the trial court abused its discretion in granting the extension. See *id.* It is ironic that Appellant attempts to characterize and even opines that Buckner did not show good cause, when Appellant was neither present at the hearing nor was there a transcript from which Appellant could be made aware of what took place at the hearing. In

fact, Appellant was not even a party to this action at the time of the hearing because they had not been served yet. However, Appellants want this Court to overturn the trial court with absolutely no evidence or substantiated argument. Appellants want this Court to overturn the trial court's ruling based on pure guess work and conjecture.

Based on M.R.C.P. Rule 60 the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- 1) fraud, misrepresentation, or other misconduct of an adverse party;
- 2) accident or mistake;
- 3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- 4) the judgment is void;
- 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- 6) any other reason justifying relief from the judgment.

First, none of the above reasons were even alleged in Appellants' Motion to Set Aside Order to the trial court. Second, none of the above reasons exist in this particular case, thus, there was no basis for the trial court to set aside its order. Third, Appellants haven't provided a single reliable basis in support of there contention that the trial court abused its discretion in granting the extension of time to serve.

Accordingly, because Appellants have not shown how the trial court abused its discretion in granting Buckner an extension of time to serve defendants, this argument should not be well taken

by this Court.

**II. Whether the trial court abused its discretion in finding “good cause” or “excusable neglect” and allowing Plaintiffs additional time to serve Defendants.**

After the trial court verbally granted Buckner a 120 day extension of time to serve defendants the court then requested that Buckner provide the court with a proposed order saying the same. Buckner complied with the court’s request and provided the court with said proposed order. After numerous weeks passed and Buckner had not received a signed order from the judge effectuating his verbal ruling, Buckner contacted the clerk’s office routinely to check the status of the signed order. After several attempts Buckner was finally provided with a signed order via facsimile on June 4, 2009. The first time Buckner received a copy of the signed order granting the additional 120 days to serve defendants was on June 4, 2009 which was 121 days from the date the trial judge verbally granted the extension. Out of an abundance of caution and in an effort to exhibit due diligence, Buckner served defendants on that same day. Subsequently, defendants filed a motion to set aside order granting extension of time and for summary judgment. The trial court set the matter for hearing and heard argument from both counsel and live testimony presented by counsel for Buckner. Defendants provided absolutely no evidence through testimony or otherwise in furtherance of their argument. The trial court made a determination that “after conducting a hearing and accepting live testimony finds that the evidence satisfies the standards required for a finding of excusable neglect and good cause and Plaintiff’s service of process under the circumstances should be accepted as proper” and accordingly the trial court denied defendants’ motion for summary judgment. It is from this ruling that Appellants also bring this appeal.

The standard of review this Court is to employ is abuse of discretion. See *Johnson v.*

*Thomas*, 982 So.2d 405, 409 (Miss. 2008). The *Johnson* Court went further to explain that “this Court leaves to the discretion of the trial court the finding of fact on the existence of good cause or excusable neglect for delay in serving process under Rule 4(h).” *Id.* That is to say , “where such discretion is abused or is not supported by substantial evidence, this court will reverse.” *Id.*

Here, the trial court, after reviewing the briefs from both counsel, held a full blown hearing to determine whether good cause or excusable neglect existed. At the hearing Buckner’s counsel not only provided the court with factual and legal arguments to support his position, but also provided the court with live testimony of his legal assistant regarding the steps that were taken to determine the status of the order. Without a signed order, counsel had no authority to serve defendants. It was not until counsel received the order did he have proper authority to serve defendants. It was due to the persistence of Buckner’s counsel that he finally received the order. Accordingly, on the very day of receipt Buckner had defendants served. The trial court went to great lengths to determine good cause and excusable neglect and ultimately that was the finding of the court.

Appellants urge this Court to substitute their judgment for that of the trial court, which had the best ability to make the determination of good cause or excusable neglect. What Appellants are asking this Court to do is not the proper role of the appellate courts. The role of the appellate court in this instance is to determine whether the trial court abused its discretion. Additionally, this Court has been clear that it leaves questions of the existence of good cause or excusable neglect to the trial court and will not reverse unless there is a finding that the trial court’s discretion is abused or not supported by substantial evidence. This Court must remember that at the hearing before the trial court defendants put on absolutely no evidence to support their position.

Appellants assert *Havard v. State*, 911 So.2d 991, 993 (Miss. Ct. App. 2005) in support of

there contention that “mere failure to learn of the entry of a judgment is not excusable neglect, “ or “good cause” . . . However, *Havard* is distinguishable from the instant case in that it involves a party attempting to extend the time allowed for an appeal of a criminal conviction. Further, the major difference between the two is, in *Havard* the defendant merely bases his argument for excusable neglect solely on the basis of not receiving the final judgment from the clerk’s office. In *Havard* the defendant presented no evidence of the actions he took toward seeking the trial court’s order. The defendant in *Havard* merely rested on his laurels and took no action or due diligence in attempting to determine whether the order even existed. Appellants also cite *Harlow v. Grandma’s House, Inc.*, 703 So.2d 73 (Miss. 1998), specifically directing this Court’s attention to the proclamation that “. . . since Harlow’s only complaint is that she failed to receive a copy of the order from the clerk or the circuit court, Harlow has not and cannot show excusable neglect” . . . Again in *Harlow* the distinction is that Harlow did not provide the court with any evidence of due diligence or any actions taken toward attempting to even determine whether an order existed. Under M.R.C.P. Rule 77(d) counsel has a duty maintain contact with the clerk’s office for filings that may not have been forwarded. In both *Havard* and *Harlow* the party seeking the extension failed to provide evidence of adhering to Rule 77(d). To the contrary, Buckner provided argument from counsel, an affidavit and live testimony regarding his adherence to the rule. This distinction is key because the above cited cases assert the “mere” fact that they did not receive a copy of the order was not enough. This lends itself to reason that not receiving a copy of the relevant order along with due diligence in attempting to seek the order’s existence in accordance with M.R.C.P. 77(d) should constitute good cause or excusable neglect.

For the above reasons this Court should affirm the rulings of the trial court finding good

cause and excusable neglect and extending the time allowed to serve defendants and in denying summary judgment.

### **CONCLUSION**

Appellants have the burden of proving to this Court, through credible and substantial evidence, that the trial court abused its discretion in refusing to set aside its February 2, 2009 order allowing an extension of time to serve defendants. At the time this order was entered Appellants were not present and not even a party to the action. Not surprisingly, Appellants have provided this Court with absolutely no evidence that substantiates their claim that the trial court abused its discretion. Additionally, Appellants do not prove or even allege any of the bases for setting aside a previous order, as provided in M.R.C.P. 60. Therefore, because Appellants have not met their burden of showing abuse of discretion, this Court should affirm the trial court's ruling.


Appellants carry the burden regarding the second issue of proving that the trial court abused its discretion in finding good cause and excusable neglect. Here again, Appellants fail. The trial required the parties to submit briefs supporting their positions and held a hearing regarding the same. Buckner provided a detailed brief with supporting facts and law, a supporting affidavit and live testimony to support his position of good cause and excusable neglect. Defendants provided the court with a brief from counsel and absolutely no evidence either through affidavit or live testimony to support its assertion. Accordingly, Appellants are not able to prove that the trial court abused its discretion in finding that good cause and excusable neglect existed.

For these reasons this Court should affirm the findings of the trial court.

Respectfully submitted this the 23<sup>rd</sup> day of July, 2010.

CHARLES BUCKNER

BY: 

Ramel L. Cotton MSB 

OF COUNSEL:

THE COTTON LAW FIRM, PLLC

Post Office Box 694

Jackson, Mississippi 39201

(601)948-5030

(601)948-5044 (fax)

ramel@rcottonlaw.com

**CERTIFICATE OF SERVICE**

I, Ramel L. Cotton, do hereby certify that I have this day served a true and correct copy of  
the Appellee's Reply Brief to the following:

Rebecca B. Cowan, Esq.  
Joseph W. Gill, Esq.  
CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.  
Post Office Box 750  
Jackson, Mississippi 39205-0750

This the 23<sup>rd</sup> day of July, 2010.

  
Ramel L. Cotton