IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-IA-003430SCT

COPIAH SCHOOL DISTRICT,
AND KENNETH FUNCHES **APPELLANTS**

V.

CHARLES BUCKNER **APPELLEE**

REPLY BRIEF OF THE APPELLANTS

On Appeal from the Circuit Court of Copiah County, Mississippi

Civil Action No. 2007-0405

(REQUEST FOR ORAL ARGUMENT WITHDRAWN)

ATTORNEYS FOR APPELLANTS:

Rebecca B. Cowan (MSB[redacted]
Joseph W. Gill (MSB#[redacted]
Currie Johnson Griffin Gaines & Myers, P.A.
1044 River Oaks Drive
Post Office Box 750
Jackson, Mississippi 39205-0750
Telephone: (601) 969-1010
Facsimile: (601) 969-5120

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. The trial court abused its discretion by refusing to set aside its February 2, 2009, Order allowing Buckner an additional 120 days to serve the Defendants/Appellants with process after the applicable statute of limitations had expired and without a showing of "good cause."

Plaintiff/Appellee, Charles Buckner (hereinafter "Buckner"), cites *Johnson v. Thomas*, 982 So. 2d 405 (Miss. 2008), for the proposition that this Court will reverse a trial court's finding of good cause or excusable neglect for delay in serving process where the trial court has abused its discretion or the trial court's finding "is not supported by substantial evidence." (*See* Reply Brief of Appellee, at p.2 [quoting *Johnson v. Thomas ex rel. Polatsidis*, 982 So. 2d 405, 409 (Miss. 2008)]). Defendants/Appellants, the Copiah County School District and Kenneth Funchess (hereinafter collectively "the School District"), agree that this is the applicable standard of review in the instant matter, but deny that Buckner has presented this Court with "substantial evidence" on appeal to support the trial court's decision to grant him a 120-day extension to serve process on the School District more than 460 days after he filed his Complaint and after the expiration of the applicable statute of limitations. In fact, Buckner has not submitted **any** evidence to this Court on appeal to support the trial court's **alleged** finding of good cause for his failure to effect service in a timely manner.[1]

---

[1] The School District uses the term "**alleged** finding of good cause" because even though Buckner argues that at the January 12, 2009, status hearing "the [trial] court made a determination that good cause existed for an extension of time to serve the defendants," (*see* Reply Brief of Appellee, at p. 2) there is absolutely no evidence in the record showing that such a determination was ever made. *See Heard v. Remy*, 937 So. 2d 939, 943 (Miss. 2006) (noting that the mere fact that the trial court grants an extension of time to serve process does not necessarily mean that the court found that good cause existed where the court made no such finding in its order granting the extension); (CP. 17; RE. 4).

Rather than demonstrating to this Court what evidence he presented to the trial court on January 12, 2009, to support its finding that good cause existed to allow him an extension of time to serve the School District, Buckner simply relies on the fact that the evidence (or the lack thereof) that he presented to the trial court outside of the School District's presence was not preserved for review by the School District or this Court. For example, Buckner writes that:

> 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.

(*See* Reply Brief of Appellee, at pp. 2-3). The lack of any evidence in the appeal record to support a finding of good cause by the trial court bolsters the School District's position, not Buckner's. Indeed, Buckner had the burden of satisfying the "strict" standard for demonstrating that good cause for delay existed in the trial court during the hearing on his first motion for an extension of time, which he failed to do. *See Montgomery v. SmithKline Beecham Corp.*, 910 So. 2d 541, 547 (Miss. 2005).[2] The School District submits that Buckner's failure to meet this burden leads to two conclusions: (1) that no "substantial evidence" existed to support the trial court's finding that good cause existed for Buckner's failure to serve the School District with process within the initial 120 days required under *MRCP* 4(h), and (2) that the trial court abused its discretion by granting Buckner an extension of time. *See Johnson v. Thomas*, 982 So. 2d at 409.

---

[2] To meet this burden, Buckner was required to present supporting "evidence (in the form of affidavits or documents) upon which a court can make a determination of whether good cause exists for failing to serve process in a timely manner." *See Webster v. Webster*, 834 So. 2d 26, 29 n.4 (Miss. 2002). Buckner cannot present any such evidence on appeal because he did not submit this evidence to the trial court during its hearing on his motion for an extension of time.

Additionally, Buckner argues that the School District had to satisfy the provisions of *MRCP* 60(b) before it could request the trial court to set aside its order granting Buckner additional time. (*See* Reply Brief of Appellee, at p. 3). Buckner's reliance on any provision of Rule 60(b), however, is misplaced since this Rule only addresses a party's seeking relief from a "**final** judgment, order, or proceeding . . . ." (emphasis added). *See also Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94, 104 (Miss. 2008)(Rule 60(b) "applies only where the judgment or order is final"). Because the trial court's order granting Buckner the 120-day extension to serve process was not a final judgment or order, the provisions of Rule 60(b) did not apply to the School District's Motion to Set Aside Order Granting Extension of Time and for Summary Judgment (hereinafter "the Dispositive Motion").

In summary, Buckner did not serve the School District with process within 120 days after he filed his Complaint, and, while seeking an extension of this 120-day period, he did not present the trial court with "substantial evidence" showing that he had good cause for this failure to serve the School District on a timely basis. Buckner has presented this Court with absolutely nothing to dispute this. As a result, the trial court abused its discretion in granting Buckner an additional 120 days to serve process. Rather, the trial court should have dismissed Buckner's complaint, and its dismissal should have been with prejudice due to the expiration of the statute of limitations.

II. The trial court abused its discretion in finding that Buckner's service of process on the School District after the expiration of the 120-day extension granted to him by the trial court was proper based on his failure to show excusable neglect or "good cause."

The trial court abused its discretion again when it found that good cause or excusable neglect existed with respect to Buckner's second failure to serve the School District within the

additional 120 days the trial court gave him on January 12, 2009. Although Buckner admits on appeal that he failed to serve the School District with process within 120 days from the date of the trial court's written Order, he argues that the "Defendants provided absolutely no evidence through testimony or otherwise in furtherance of their argument" that good cause and excusable neglect did not exist. (*See* Reply Brief of Appellee, at p. 4). Contrary to Buckner's position, **Buckner had the burden** to prove that good cause exists for his failure to serve the School District within this 120-day extension. The School District only had the burden to show that it was not served with process within the additional 120 days the trial court allowed Buckner. *See Montgomery v. Smithkline Beecham Corp.*, 910 So. 2d 541, 547 (Miss. 2005) ("The burden is upon the plaintiffs to demonstrate good cause for failure to timely serve process."). As discussed in the School District's original brief, because Buckner has failed to meet this burden, the trial court abused its discretion in finding that good cause existed.

The **only** evidence Buckner argues on appeal to support the trial court's decision that good cause or excusable neglect existed for his failure to serve the School District with process within the additional 120 days he received on January 12, 2009, is the fact that his counsel did not receive a copy of the February 2, 2009 written Order memorializing the trial court's January 12, 2009 oral decision until June 4, 2009, two days after his 120-day extension had expired.[3]

---

[3] Although Buckner argues on appeal that when he received the Order on June 4, 2009, it was on "the 121st day from the date of the hearing" (*see* Reply Brief of Appellee, at p. v), this is incorrect. June 4, 2009, was actually 143 days after the January 12, 2009 hearing during which the trial court initially granted Buckner's requested 120-day extension. Even if one uses February 2, 2009, *i.e.*, the date that the trial court executed the Order which Buckner's counsel prepared and submitted to memorialize the trial court's January 12, 2009 ruling, June 4, 2009, was the 122nd day, not the 121st day. Therefore, Buckner's service of process on the School District on June 4, 2009, occurred two days after the expiration of the 120 days he obtained. However, whether Buckner was one day late or one hundred days late does nothing to change the undisputed fact that he did not serve the School District within the extension of time given to him, *i.e.*, he made no effort, diligent or otherwise, to serve the School District from February 2, 2009, to June 4, 2009.

(*See* Reply Brief of Appellee, at p. 4; CP. 70-72). According to Buckner:

> 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.

(*See* Reply Brief of Appellee, at p. 5)(emphasis added). This position by Buckner defies logic and common sense. According to Buckner, the written Order of the trial court did not apply to him until he actually received a copy of it, even though he readily admits (1) that his counsel knew what the Order stated since he drafted the Order, (2) that his counsel knew that the Order had been entered long before he obtained a copy of it, and (3) that his counsel did **absolutely nothing** to obtain a copy of it, except for calling the clerk's office and asking that a copy be mailed to him. Not only is Buckner's argument without merit, but it is also contrary to existing Mississippi law. As noted in the School District's original brief, under the holding in *Pinkston v. Mississippi Department of Transportation*, 757 So. 2d 1071, 1073 (Miss. Ct. App. 2000), a plaintiff's failure to act within the allotted time after the entry of an order that he knows exists is not the result of excusable neglect simply because he has not received a copy of that order from the clerk. According to the Court:

> [The plaintiff's] only explanation was that neither she nor her attorney received notice through the mail that a judgment had been entered. **This is no excuse.** The letter sent to the Scott County Board of Supervisors by [the plaintiff's counsel] confirms that she had actual knowledge of the order . . . [The plaintiff's] counsel offered this Court **nothing close to excusable neglect** in the way of an explanation for failing to perform the most perfunctory of duties involved in filing an appeal.

Id. (emphasis added).[4] Thus, Buckner's sole excuse for failing to serve the School District in a

---

[4] While Buckner does not attempt to distinguish the case *sub judice* from *Pinkston*, he does attempt to distinguish the present case from *Havard v. State*, 911 So. 2d 991 (Miss. Ct. App. 2005), due to the fact that *Havard* "involve[d] a party attempting to extend the time allowed for an appeal of a criminal conviction." (*See* Reply Brief of Appellee, at p. 6). However, Buckner does not explain how this distinction makes any difference in the analysis of this issue, and the School District fails to see one.

timely manner, *i.e.*, that he "did not receive a copy of the . . . order in the mail from the court clerk" is "nothing close to excusable neglect." *See id.*

Buckner also argues that good cause existed for his failure to serve the School District within the additional 120 days given to him by the trial court because, unlike the parties in *Havard v. State*, 911 So. 2d 991 (Miss. Ct. App. 2005) and *Harlow v. Grandma's House, Inc.*, 730 So. 2d 73 (Miss. 1998), he acted "with due diligence in attempting to seek the order's existence." (*See* Reply Brief of Appellee, at p. 6). The School District submits that this argument by Buckner is both misleading and meritless. First, Buckner admits that his counsel **was** aware of the order's existence long before he received a copy of it (allegedly for the first time)[5] on June 4, 2009. Second, Buckner admits that his counsel **knew** that the trial court had orally granted his motion for extension of time on January 12, 2009. (CP. 124; RE. 18). Third, Buckner admits that his counsel was **aware** that the February 2, 2009 written Order had been entered shortly after the fact. During the November 10, 2009, hearing on the School District's Dispositive Motion, Brenda Jordan, legal assistant to Buckner's counsel, testified that while Buckner's counsel did not receive a copy of the February 2, 2009 Order from the Circuit Clerk's office until June 4, 2009, **the Circuit Clerk's office told her soon after she began making her "numerous" calls to that office that the Order had been signed and entered on the docket**. (CP. 115-21; RE. 9-15).[6] According to Ms. Jordan's affidavit, she began making her calls

---

[5] The Copiah County Circuit Clerk's Docket shows that a copy of the Order was sent to Buckner's counsel on February 3, 2009. (CP. 1; RE. 1). Buckner's counsel admitted as much and stated that while he did not receive the Order, he had no evidence showing that it had not been sent. (CP. 124-25; RE. 18-19).

[6] Furthermore, Buckner's counsel easily could have found out the exact date when the Order was executed by the trial court by requesting this information from the court clerk during any one of the "numerous" calls that his assistant made to the clerk's office regarding the Order. However, Buckner's

several months before June 4, 2009. (CP. 75). As such, Buckner was aware of the existence of the entered Order long before June 4, 2009.

Buckner attempts to distinguish the case *sub judice* from *Havard v. State*, 911 So. 2d 991 (Miss. Ct. App. 2005), and argues that *Havard* actually support his position. While the School District agrees that *Havard* is distinguishable from the present case, this distinction in no way assists Buckner in his argument that good cause exists for his failure to serve the School District within the 120-day extension he obtained from the trial court. The court in *Havard* held that "[m]ere failure to learn of the entry of a judgment is not excusable neglect" for failing to take action within a specified amount of time following the entry of the judgment. 911 So. 2d at 993. In the present case, Buckner cannot offer this as an excuse for his failure to act in a timely manner since his counsel **knew** that the trial court had granted his motion for extension **and** that a written Order had been entered in the court file. Nevertheless, Buckner's counsel took no action whatsoever until after the additional 120 days had expired, and his only excuse for this failure to act is that his counsel did not receive a copy of an Order that had already been filed with the court. Where a party's "only complaint is that [he] failed to receive a copy of the order from the clerk of the circuit court, [the party] **has not and cannot show excusable neglect**." *Harlow v. Grandma's House, Inc.*, 730 So. 2d 73, 76 (Miss. 1998) (emphasis added). *See also Pinkston*, 757 So. 2d at 1073 (holding that where plaintiff had knowledge of the Order despite the fact that she did not receive a copy of it from the court clerk she showed "nothing close to excusable neglect").

Buckner also attempts to distinguish the present case from *Harlow* by arguing that

---

counsel "never instructed [Ms. Jordan] to find out what date the order was." (CP. 121; RE 15).

"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." (*See* Reply Brief of Appellee, at p. 6). Buckner asserts that such "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." (*See* Reply Brief of Appellee, at p. 6). In other words, Buckner argues that if Harlow, through due diligence and in accordance with Rule 77(d), learned that an Order existed and then failed to act in a timely manner, her acts would constitute good cause or "excusable neglect." This argument makes no sense since it leads to only one conclusion during this appeal – that the trial court's written Order granting Buckner more time, which his counsel knew had been filed with the court, was not enforceable as to Buckner until he received a copy of it. The School District submits that the trial court's finding that this explanation by Buckner amounted to good cause was an abuse of discretion.

CONCLUSION

Buckner failed to serve the School District in a timely manner not once, but twice. Furthermore, Buckner failed to show good cause for his delay in serving the School District on both occasions. Thus, the trial court abused its discretion when it granted Buckner an additional 120 days to serve the School District after the expiration of the applicable statute of limitations on January 12, 2009, and when it found that good cause or excusable neglect existed for Buckner's second failure to serve the School District after he was granted an unwarranted extension of time. Therefore, Appellants, the Copiah County School District and Kenneth Funchess, respectfully request that this Court reverse the trial court's decision to deny their Motion to Set Aside Order Granting Extension of Time and for Summary Judgment and remand the case to the trial court with instructions to dismiss Buckner's Complaint with prejudice.

This the 27th day of August, 2010.

Respectfully submitted,

COPIAH COUNTY SCHOOL DISTRICT AND KENNETH FUNCHESS

BY: _____

REBECCA B. COWAN (MSB[redacted]
JOSEPH W. GILL (MSB#[redacted]

OF COUNSEL:

CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
1044 River Oaks Drive
Post Office Box 750
Jackson, Mississippi 39205-0750
Telephone: (601) 969-1010
Telefax: (601) 969-5120

CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be mailed and/or hand-delivered, a true and correct copy of the above and foregoing document to:

Honorable Lamar Pickard,
Copiah County Circuit Court Judge
P.O. Box 310
Hazlehurst, MS 39083

Edna E. Stevens,
Copiah County Circuit Clerk
P.O. Box 467
Hazlehurst, MS 39083

Kathy Gillis,
MS Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

Ramel L. Cotton, Esq.
The Cotton Law Firm, PLLC
100 West Amite Street
Jackson, MS 39201

This the 27th day of August, 2010.

JOSEPH W. GILL