IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-IA-00343-SCT

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

V.

CHARLES BUCKNER **APPELLEE**

BRIEF OF THE APPELLANT

On Appeal from the Circuit Court of Copiah County, Mississippi

Civil Action No. 2007-0405

(ORAL ARGUMENT REQUESTED)

ATTORNEYS FOR APPELLANTS:

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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, Esquire, Attorney for Appellants
4. Joseph W. Gill, Esquire, Attorney for Appellants
5. Currie Johnson Griffin Gaines & Myers, P.A., Attorneys for Appellants
6. Charles Buckner, Appellee
7. Ramel L. Cotten, Esquire, Attorney for Appellee
8. Morgan & Morgan, P.A., Attorneys for Appellee

SO CERTIFIED, this the 3rd day of June, 2010.

Rebecca B. Cowan (MSB[redacted]
Joseph W. Gill (MSB#[redacted]
Attorneys for Appellants

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STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion by refusing to set aside its February 2, 2009, Order allowing Appellee/Plaintiff, Charles Buckner ("Buckner"), an additional 120 days to serve Appellants/Defendants, Copiah County School District ("the School District") and Kenneth Funchess ("Funchess"), with process after the applicable statute of limitations had expired and without a showing of "good cause."

II. Whether the trial court abused its discretion in finding that Buckner's service of process on the School District and Funchess after the expiration of the 120-day extension granted to him by the trial court on February 2, 2009, was proper based on his failure to show "excusable neglect" or "good cause."

STATEMENT OF THE CASE

On October 30, 2007, Buckner filed his Complaint against the School District and Funchess, alleging that he was injured in a school bus/automobile accident which occurred on December 15, 2006, allegedly as a result of the negligence of Funchess, a School District employee. (CP. 8-11). Buckner failed to serve the School District or Funchess with process by February 27, 2008, *i.e.*, 120-days after the day he filed his Complaint. Thus, after being tolled for 120 days, the one-year statute of limitations for Buckner's claims began to run again on February 28, 2008, and expired on November 8, 2008. According to Buckner, on January 12, 2009, the trial court orally granted him an additional 120 days to serve Funchess and the School District with process, and on February 2, 2009, the trial court signed an Order to this effect.[1] (CP. 17,124; RE. 4, 13). The additional 120 days expired on June 2, 2010. Buckner, however, did not serve the School District until June 4, 2010, and did not serve Funchess until June 5, 2010. (CP. 22-29).

On June 17, 2009, the School District answered Buckner's Complaint and filed its Motion to Set Aside Order Granting Extension of Time and for Summary Judgment, asserting that because Buckner had failed to serve the School District within the 120 days required under Rule 4(h), MRCP, his Complaint should be dismissed, and that because the statute of limitations had expired, the dismissal should be with prejudice. (CP. 30-39). On July 2, 2009, Funchess filed his answer and joined in the School District's motion. (CP. 62-69).

On February 5, 2010, the trial court denied the Motion to Set Aside Order Granting Extension of Time and for Summary Judgment, and signed an Order to this effect, which was

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[1] The Order was filed with the clerk's office on February 3, 2009. (CP. 17; RE. 4)

entered on February 8, 2010. (CP. 94; RE. 5). Funchess and the School District subsequently filed their Petition for Interlocutory Appeal and for Stay of Trial Court Proceedings, which this Court granted. (CP. 95-138).

STATEMENT OF THE FACTS

Buckner filed a Complaint against the School District and Funchess, alleging that he was injured in a school bus/automobile accident on December 15, 2006, as a result of the negligence of Funchess, a School District employee. (CP. 8-11). Buckner filed his Complaint on October 30, 2007, and had summonses issued for the School District and Funchess that same day. (CP. 8, 12-13). Buckner's filing of his Complaint tolled the one-year statute of limitations applicable to his claims, *Miss. Code Ann.* §11-46-11(3), for 120 days, through February 27, 2008. Without any tolling, the statute of limitations would have expired on July 11, 2008 (December 15, 2006[2] + 365 days[3] + 210 days[4]). Thus, 255 days remained in the limitations period when the Buckner filed his Complaint.

Even though the School District's offices were located only half of a mile from the courthouse where Buckner filed his Complaint, he did not serve the School District or Funchess with process within 120-days as required by MRCP 4(h). As a result, the one-year statute of limitations began to run again on February 28, 2008, and expired on November 8, 2008, 254 days later . During this time period, Buckner did not re-file his Complaint, he did not serve process on the School District or Funchess, and he made no request for an extension of time to serve process on either of them.

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[2] December 15, 2006, is the date the Complaint was filed.

[3] This 365 days is for the one-year statute of limitations.

[4] This additional 210 (90 days + 120 days) is provided under the terms of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(3).

On November 19, 2008, the trial court issued a Notice of Status Hearing, requiring Buckner to appear in the case on January 12, 2009.[5] (CP. 14). Although there is no transcript of what occurred at this hearing, counsel for Buckner reminded the trial court of what had transpired at the hearing during a November 10, 2009 hearing on the School District and Funchess' Motion to Set Aside Order Granting Extension of Time and for Summary Judgment by stating the following:

> [A]s I explained at the status conference, I had hired a process server that said he actually served –
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> ***
>
> The process server gave me the understanding they had been served. And because of that, I went back to check my file to see if an answer had been filed and it had not been. When I appeared for the status conference, I checked the file and realized they had not been served. I went to the clerk's office. They explained to me I needed to file a motion to withdraw that default, and I did that and –

(CP. 123-24; RE. 17-18). Buckner's counsel further explained that the trial court had orally granted Buckner's request for an extension of time to serve process and had requested that a written Order be submitted memorializing its ruling. (CP. 124; RE. 18). On the date of that hearing, the statute of limitations had been expired for over two months–since November 8, 2008.

On February 2, 2009, nearly three months after the statute of limitations had expired, the trial court signed an Order granting Buckner's motion, giving him an additional 120 days in which to serve the School District and Funchess with process. (CP. 17; RE. 4). The Order does

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[5] On the same day, Buckner's counsel applied for a clerk's entry of default pursuant to MRCP 55, stating in an affidavit that the defendants were served on October 30, 2007, the day the Complaint was filed. (CP. 16). Buckner's counsel later admitted that his affidavit was incorrect, and there were no grounds for an entry of default. (CP. 50).

not state whether Buckner showed "good cause" for his failure to serve process on the School District and Funchess for over a year–461 days–after he had filed his Complaint. (CP. 17; RE. 4). The entry of the order occurred nearly three months–86 days–after the statute of limitations had expired. The additional 120-day extension given Buckner in the February 2, 2009 Order expired on June 2, 2009. Buckner, however, waited until June 4, 2009, to serve the School District with process, and until June 5, 2009, to serve Funchess. (CP. 22, 26).

On June 17, 2009, the School District answered Buckner's Complaint, asserting, *inter alia*, that because Buckner had failed to serve the School District within the 120 days required under Rule 4(h), his Complaint should be dismissed under the provisions of MRCP 12(b)(4)(5) and (6). (CP. 30). Additionally, the School District's Answer asserted that Buckner's "failure to serve the defendant with proper service of process within the 120 days specified in MRCP 4(h) requires this Court to dismiss his Complaint with prejudice due to the running of the statute of limitations set forth in Miss. Code Ann. 11-46-11(3)." (CP. 30). Funchess asserted identical defenses in his July 2, 2009, answer. (CP. 62).

The School District also filed its Motion to Set Aside Order Granting Extension of Time and for Summary Judgment (hereinafter referred to as "the Dispositive Motion") on June 17, 2009, arguing the above-referenced affirmative defenses. (CP. 36-39). Funchess joined in the motion on July 2, 2009. (CP. 68-69). Buckner filed his Response to the Dispositive Motion on July 31, 2009, asserting the following as his reason for not serving the School District or Funchess with process within the additional 120-day period:

> 4. This Court filed the Order extending Buckner's time for serving the complaint for an additional 120 days on February 3, 2009, however, a copy of

said Order was not forwarded to Buckner or his counsel.[6]

5. Despite Buckner's counsel's adherence to 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, it was ultimately due to Buckner's counsel's persistent contact with the clerk's office that the Order was finally received by facsimile on June 4, 2009 at 9:27 a.m. See attached exhibit.

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11. It is undisputed that the complaint was served on June 4, 2009. However, this was the first notice Buckner received that the Order granting the extension had been filed. Despite Buckner counsel's adherence to his duty to remain in contact with the clerk's office for filings, the first notice of the Order was June 4, 2009.[7]

(CP. 70-72).

In support of his Response opposing the Dispositive Motion, Buckner relied on an Affidavit executed by Brenda Jordan, legal assistant to Buckner's counsel, in which Ms. Jordan stated as follows:

3. [Buckner's counsel] instructed me to maintain contact with the Copiah County Circuit Clerk's office to determine when an Order granting an additional 120 days to serve the complaint was filed.

4. During the period of January 10, 2009 – the date of the hearing – and June 4, 2009, I maintained regular contact with the clerk's office inquiring whether the Order had been filed and if so requesting a copy of the Order.[8]

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[6] Contrary to this contention, 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).

[7] This statement demonstrates the relative ease with which Buckner could have served the School District and Funchess with process during the initial 120-day period after he filed his Complaint, *i.e.*, Buckner served the School District on the same day his counsel claims he received a copy of the Order granting additional time, and he served Funchess the next day.

[8] The hearing referenced by Ms. Jordan actually occurred on January 12, 2009, not January 10, 2009. (CP. 14).

5. After numerous calls to the clerk's office regarding the Order, the first receipt of the Order was June 4, 2009 by facsimile.

(CP. 75-76).

On November 10, 2009, the trial court held a hearing on the School District and Funchess' Dispositive Motion. (CP. 112-27; RE. 6-21). At this hearing, Ms. Jordan 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). According to Jordan's affidavit testimony referenced above, she began calling the Circuit Clerk's office on January 10, 2009, [*sic*] and stopped on June 4, 2009. (CP. 75). When asked whether she inquired about the date of the Order with the clerk's office or sent someone to the clerk's office to obtain a copy of the Order, Jordan testified that she had not. (CP. 119-21; RE. 13-15). Instead, Jordan testified that she simply continued to call the clerk's office to request a copy of the Order. (CP. 116-20; RE. 10-14).

On February 5, 2010, the trial court denied the Dispositive Motion, and signed an Order to this effect. (CP. 93; RE. 5). This Order was entered on the court docket on February 8, 2010. (CP. 93; RE. 5). According to the February 5, 2010, Order, the trial court found, "after conducting a hearing and accepting live testimony . . . 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." (CP. 93; RE. 5).

SUMMARY OF THE ARGUMENT

Buckner failed to serve either the School District or Funchess with process within 120 days after he filed his Complaint as required by Rule 4(h), MRCP. Because Buckner did not provide the trial court with any evidence to show that his failure to serve the defendants within the allotted 120 days was for "good cause," the trial court abused its discretion in allowing Buckner an additional 120 days to serve the defendants. Rather, the trial court should have dismissed Buckner's Complaint at that time. Furthermore, because the statute of limitations applicable to Buckner's claims began to run again after the 120-day tolling period following the filing of his Complaint, and expired prior to the trial court's grant of the additional 120 days to serve process, the dismissal should have been with prejudice.

The trial court further abused its discretion in finding that "good cause" existed for Buckner's failure to serve either the School District or Funchess with process within the additional 120 days that it had granted Buckner after the expiration of the statute of limitations. Buckner's excuse for failing to do so that he did not receive a copy of the Order granting the additional 120 days from the Circuit Clerk is insufficient to show that he made any diligent effort to effect service within the additional allotted time. Even if Buckner did not receive a copy of the Order before the expiration of the additional 120 days, he was aware that the Court had orally granted him an additional 120 days to serve process **and** that the written Order memorializing the Court's grant of additional time had been entered. Despite being granted this additional time, Buckner made no effort to serve either the School District or Funchess during the time allowed. Because Buckner made no showing of "good cause" for his failure to serve the defendants within the additional 120 days, the trial court should have dismissed his Complaint, and, because the

statute of limitations had expired, the dismissal should have been with prejudice.

STANDARD OF REVIEW

The Supreme Court applies a *de novo* standard of review to a trial court's grant or denial of a motion for summary judgment. *See Whitaker v. Limeco Corp.*, No. 2009-CA-00351-SCT (¶ 10), 2010 WL 1379991, at *3 (Miss. Apr. 8, 2010). However, the Court reviews a trial court's decision regarding whether good cause exists for failure to serve process within the time allotted by Rule 4(h), MRCP. *See Stutts v. Miller*, No. 2008-CA-01866-SCT (¶ 7), 2010 WL 963168, at *2 (Miss. Mar. 18, 2010) (citing *Johnson v. Thomas ex rel. Polatsidis*, 982 So. 2d 405, 409 (Miss. 2008)). The Court will reverse the trial court's decision where it has abused its discretion or the decision "is not supported by substantial evidence." *Id.* (quoting *Johnson*, 982 So. 2d at 409).

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 School District and Funchess with process after the applicable statute of limitations had expired and without a showing of "good cause."

A. Buckner failed to serve the School District or Funchess within 120 days of filing his Complaint

Rule 4(h) of the *Mississippi Rules of Civil Procedure* states as follows:

> **(h) Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days 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.

It is undisputed that Buckner failed to serve either the School District or Funchess with process within 120 days after he filed his Complaint as required by Rule 4(h). As a result, the trial court

was required to dismiss Buckner's Complaint at the expiration of the 120 day period unless Buckner showed "good cause why such service was not made within that period." *See* MRCP 4(h).

B. Buckner failed to show "good cause" for failing to serve the School District or Funchess within 120 days of filing his Complaint

The burden of demonstrating "good cause why such service was not made within that [120 day] period" was on Buckner. *See Montgomery v. Smithkline Beecham Corp.*, 910 So. 2d 541, 547 (Miss. 2005). A motion for additional time to serve process based on a showing of "good cause" "should be supported by 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." *Webster v. Webster*, 834 So. 2d 26, 29 n.4 (Miss. 2002). "[S]ome level of detail appears to be required to demonstrate a showing of good cause." *Kingston v. Splash Pools of Miss., Inc.*, 956 So. 2d 1062, 1065 (Miss. Ct. App. 2007). While the determination of whether the plaintiff has shown "good cause" is within the discretion of the trial court, the trial court's discretion is abused where there is a lack of "substantial evidence" to support its finding. *See Johnson v. Thomas*, 982 So. 2d 405, 409 (Miss. 2008). It is error for the trial court to grant a motion for an extension of time filed by a plaintiff outside the 120 days allotted by Rule 4(h), "without first addressing the issue of good cause." *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 "good cause" existed where the court made no such finding in its order granting the extension). "In order to establish that good cause exists for late service, a plaintiff must have made a diligent effort to effect service." *Foss v. Williams*, 993 So. 2d 378, 379 (Miss. 2008)(citing *Montgomery*, 910 So 2d at 546 ("'Good

cause' can never be demonstrated where [the] plaintiff has not been diligent in attempting to serve process.")). This Court has held that in order for a plaintiff to establish "good cause" for a delay under Rule 4(h), he must demonstrate facts satisfying a showing of "excusable neglect." *Webster v. Webster*, 834 So.2d 26, 27-28 (Miss. 2002) (quoting *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993) ("To establish 'good cause' the plaintiff must demonstrate 'at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.")). "[E]xcusable neglect' is a '**very strict standard.**'" *Id.* at 29 (quoting *Moore v. Boyd*, 799 So. 2d 133 (Miss. Ct. App. 2001)) (emphasis added). *See also Lucas v. Baptist Memorial Hospital-North Mississippi, Inc.*, 997 So. 2d 226, 230 (Miss. 2008) (counsel's heavy caseload during period required for service of process is not enough to establish good cause); *Shelton v. Lift, Inc.*, 967 So. 2d 1254 (Miss. Ct. App. 2007) ("honest mistake" of plaintiff's counsel's paralegal in calculating 120-day period "is neither good cause nor excusable neglect"); *LeBlanc v. Allstate Ins. Co.*, 809 So. 2d 674, 677 (Miss. 2002) (failure to have process served for four months "without adequate explanation, shows a lack of diligence beyond excusable neglect"); *Watters v. Stripling,* 675 So. 2d 1242, 1243 (Miss. 1996) ("derelict performance by . . . counsel in not serving [defendant] timely is insufficient to show excusable neglect or good cause).

Prior to the entry of the trial court's February 2, 2009, Order in the present case, Buckner did not establish "good cause" for his failure to serve process on either the School District or Funchess within the allotted 120 days.[9] This is evidenced not only by the fact that the Order did

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[9] While Buckner had summonses issued for both the School District and Funchess on October 30, 2007 (the day he filed his Complaint), he did not serve either of these defendants with process within 120 days, despite the fact that the offices of the School District, a local governmental entity, were located **only one-half mile from the courthouse** where Buckner filed his Complaint.

not indicate that the trial court ever made a specific finding of "good cause" as required by Rule 4(h), but it is also supported by the fact that Buckner **never** filed a motion with attached documents or affidavits giving his reasons why "good cause" existed, *see Webster*, 834 So. 2d at 29 n.4, and by the fact that there is **no** transcript of any hearing regarding Buckner's request for additional time.

The only record of what Buckner may have told the trial court at the January 12, 2009, status hearing on why "good cause" existed for his failure to serve process is found in the transcript of the November 10, 2009, hearing on the Dispositive Motion. At this hearing, Buckner's counsel stated that he had previously advised the trial court that his hired process server "gave [him] the understanding they had been served," even though such was admittedly contradicted by the "file."[10] (CP. 123; RE. 17). This assertion by Buckner's counsel was clearly insufficient to establish "good cause." *See Kingston*, 956 So. 2d at 1065 (citing *Smith County Sch. Dist. v. McNeil*, 743 So. 2d 376, 379 (Miss. 1999)) ("Our supreme court has stated that the court 'cannot rely solely on an inference based upon the unsworn statement of an attorney made during a hearing without any evidence to support his assertion of fact.'"). In *Kingston*, the Mississippi Court of Appeals affirmed a trial court's finding of no "good cause" where "the only evidence before the [trial] court was the 'unsubstantiated oral representations of the Plaintiff's attorney which is not sufficient as a matter of proof as to what attempts were made and when they were made to serve process." *Id.* According to the Court:

> While Kingston or his attorney may have had personal knowledge of the server's attempts, the record is void of any detail to support such an assertion. For instance, no dates, times or locations were given that any efforts had been made to

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[10] Whether the "file" referenced by Buckner's counsel was his own file or the Court's file is unclear.

> serve process on the defendants within the 120-day time period. **Likewise, no affidavit from the process server exists to demonstrate if any attempts were made, and the record is void of any returns of the summons originally issued.**

Id. at 1065 (emphasis added).[11]

Furthermore, even if Buckner had presented evidence that the process server had given his counsel "the understanding" that the School District and Funchess had been served, such evidence in and of itself would not constitute a showing of "good cause." While this Court has held that "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," *see Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1186-87 (Miss. 2002) (quoting 4B Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. § 1137, at 342 (3d ed. 2000)), the central issue is whether the plaintiff "acted diligently in attempting to effect service of process." *See Holmes*, 815 So. 2d at 1186-87. *See also Powe v. Byrd*, 892 So. 2d 223, 226 (Miss. 2004). In the case *sub judice*, even if there were evidence that the process server had given Buckner's counsel "the understanding" that the defendants had been served, Buckner's

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[11] Additionally, since there is no evidence establishing the date that the process server allegedly indicated to Buckner's counsel that the defendants had been served, no one will ever know whether the process server allegedly led Buckner's counsel to believe that the defendants were served before or after the 120-day deadline. An inference can certainly be drawn that such communication did not occur until after the 120-day deadline since Buckner's counsel, during the November 10, 2009 hearing, stated that because "[t]he process server gave [him] the understanding they had been served," he "went back to check [his] file to see if an answer had been filed and it had not been." (CP. 123; RE. 17). After finding that no answer had been filed, Buckner's counsel applied for an entry of default on January 10, 2009, over two months after the expiration of the 120-day deadline. It is highly unlikely that Buckner's counsel waited over two months to apply for an entry of default when no answers were filed pursuant to the summonses. It is more likely that the process server led him to believe that the defendants had been served **after** the 120-day deadline had expired. While this is a matter of mere speculation, it is a plaintiff's burden to show that "good cause" for the delay of service existed, *see Montgomery*, 910 So. 2d at 547, and where a plaintiff presents no evidence, mere speculation is all there is to work with.

counsel never bothered to obtain a return of service from his hired process server and did not bother to check with the clerk's office to see if a return of service had been filed until the January 12, 2009 status conference, over two months after the expiration of the 120-day time limit. This clearly shows that he was not diligent in attempting to effect service.

An analogous case was decided by the Iowa Court of Appeals in *Barnett v. Wimer*, 753 N.W.2d 18, 2008 WL 2200242, at *1 (Iowa Ct. App. 2008) (unpublished disposition), where the plaintiff, citing Iowa case law holding that "[g]ood 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," asserted that her failure to serve the defendants within the allowed time period was due to, *inter alia*, the fact that "the process server misled her." (quoting *Wilson v. Ribbens*, 678 N.W. 2d 417, 421 (Iowa 2004)). According to the Court:

> Approximately three weeks before the service deadline expired, an employee of Barnett's [plaintiff's] attorney instructed the process server that "the doctors [defendants] need served [*sic*] personally at home or at work unless an individual signs an acceptance of service on their behalf, which I have attached." The same day, the process server executed an affidavit of service that noted [defendants] were served "Personally." Over the space indicating the "name and title or relationship of individuals served," the server wrote "c/o Craig Kelinson, J.D." [a physician who worked for the defendants' employer.] No acknowledgment of service form was attached to this affidavit. The document was filed with the clerk of court three days before the service deadline.
>
> There is no indication that Barnett's attorney followed up with the process server before the service deadline expired to determine why the physicians were not personally served, what Attorney Kelinson's relationship was to the physicians, whether he had authority to accept service on behalf of the physicians, and whether he signed an acceptance of service form, as directed. . . .
>
> Because Barnett's attorney failed to investigate a facially confusing return of service, the district court did not err in finding no good cause for the delay in service. . . . .

Id. at *2. As in *Barnett*, Buckner's counsel's mere reliance on the process server's alleged

indication that the School District and Funchess had been served without following up on where the returns were does not demonstrate good cause for the delay in service. In fact, the present case presents a greater showing of lack of diligence that in *Barnett*, since rather than merely failing to follow up with the process server regarding a "facially confusing return of service," Buckner's counsel failed to follow up on obtaining a return of service **at all**.

The present case is distinguishable from *Spurgeon v. Egger*, 989 So. 2d 901, 908 (Miss. Ct. App. 2007), where the Court of Appeals reversed a trial court's finding of no "good cause" for the plaintiffs' failure to properly serve the defendants within the requisite 120 days where, *inter alia*, (1) the process server's service was defective, though not nonexistent; (2) the process server's sworn return indicated personal service of process on the defendant; and (3) immediately following the defective service, the defendant's attorney communicated with plaintiff's counsel in a manner that gave plaintiffs' counsel a reason to believe that the defendant had been served. None of these facts exist in the present case.

In the case *sub judice*, service of process within the allotted 120-day period was not defective, **it was nonexistent**. There was no sworn return indicating personal service on any defendant. Buckner's counsel confirmed this during the November 10, 2009, hearing on the Dispositive Motion by stating that when he "checked the file" he realized that neither the School District nor Funchess had been served. (CP. 123; RE. 17). Furthermore, there is no evidence of any communication from the School District, Funchess or their counsel to Buckner or his counsel which would have led them to believe that the defendants had any notice of the lawsuit before the January 12, 2009, status hearing. As a result, unlike the facts in *Spurgeon*, there is no evidence that Buckner acted diligently to have either the School District or Funchess served with process during the 120-day period following the date he filed his Complaint.

Because there was no evidence (much less "substantial evidence") supporting a finding of "good cause," the trial court's Order granting Buckner's request for additional time to serve process, and its subsequent denial of the Dispositive Motion, were an abuse of discretion. The trial court should have dismissed Buckner's Complaint at the January 12, 2009, status hearing due to (1) Buckner's failure to serve process on the defendants within 120 days, and (2) his inability to show "good cause" for that failure. Additionally, because the statute of limitations had expired before January 12, 2009, the trial court should have dismissed Buckner's Complaint with prejudice. *See Johnson*, 982 So.2d at 415 (a trial court had inherent power while controlling its dockets to void a previous order it had entered allowing an extension of time in which to serve process and to dismiss a complaint with prejudice because the statute of limitations applicable to the plaintiff's claims had expired when the order was entered); *Heard*, 937 So.2d at 940-941 (trial court erred by not requiring plaintiff, who had failed to serve process within 120 days, to demonstrate good cause before giving extension, but it "cured its own error by subsequently finding good cause had not been shown and the statute of limitations had expired" after the defendants challenged the extension); *Triple "C. Transp., Inc. v. Dickens*, 870 So. 2d 1195, 1199 (Miss. 2004) (holding that when a complaint is filed within the statute of limitations, "the statute of limitations stops running, *for a time*") (emphasis added); *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1185 (Miss. 2002) ("Filing of a complaint tolls the applicable statute of limitations 120 days, but if the plaintiff fails to serve process on the defendant within that 120-day period, the statute of limitations automatically begins to run against when that period expires.").

II. The trial court abused its discretion in finding that Buckner's service of process on the School District and Funchess after the expiration of the 120-day extension granted to him by the trial court on February 2, 2009, was proper based on his failure to show "excusable neglect" or "good cause."

Despite the fact that the trial court granted his request for additional time to serve the School District and Funchess on January 12, 2009, Buckner still failed to serve either of these defendants within the additional 120 days he obtained. Buckner admitted as much in his Response in Opposition to the Dispositive Motion by arguing that his failure to serve either of the defendants within the additional 120 days was excusable since he did not receive a copy of the February 2, 2009, Order until after the additional 120 days had expired. This response is insufficient to show "good cause," especially in light of the admission by Buckner's counsel's employee at the hearing on the Dispositive Motion that the Circuit Clerk's office told her, **prior to the expiration of the additional 120 days**, that the Order had been entered.[12]

Similar to the facts claimed in the present case, in *Pinkston v. Mississippi Department of Transportation*, 757 So. 2d 1071, 1073 (Miss. Ct. App. 2000), counsel for the plaintiff claimed "that she did not receive a copy of the trial judge's dismissal order in the mail from the court clerk," but admitted in a letter that the clerk had orally informed her that the court had granted the motions to dismiss. As such, the court in *Pinkston* held that the plaintiff's counsel had "actual notice" of the entry of the dismissal order, such that her failure to timely appeal the order was not the result of "excusable neglect." *Id.* According to the court:

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[12] While Ms. Jordan did not expressly state during her testimony at the November 10, 2009, hearing that the Circuit Clerk's office informed her of the Order's entry prior to the expiration of the 120-day period, this is the only logical conclusion to be reached after examining her testimony at this hearing and the testimony she provided in her Affidavit attached to Buckner's Response to the Dispositive Motion. At the hearing, she testified that she was informed of the Order's entry soon after she began calling the Circuit Clerk's office. (CP. 115-21; RE. 9-15). In her Affidavit, she testified that she began making "numerous" calls and "maintained regular contact with the clerk's office" on January 10, 2009, up until June 4, 2009. (CP. 75).

> [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).

Even if Buckner's counsel had not been aware of the length of time the trial court had given him in its signed Order, he knew on January 12, 2009, that the trial court had orally granted his request for additional time, and, yet, he made **no effort whatsoever** to serve either the School District or Funchess with process until June 4, 2009, nearly five months later.[13] Furthermore, the School District and Funchess submit that even had Buckner's counsel never learned of the Order's entry, this lack of knowledge still would not constitute "excusable neglect." *See, e.g., Havard v. State*, 911 So. 2d 991, 993 (Miss. Ct. App. 2005) ("Mere failure to learn of the entry of a judgment is not excusable neglect," or "good cause" excusing a party's failure to file an appeal in a timely manner.); *Harlow v. Grandma's House, Inc.*, 730 So. 2d 73 (Miss. 1998) ("We conclude 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" for her failure to file a timely notice of appeal).

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[13] This is not a case like *Jenkins v. Oswald*, 3 So. 3d 746, 749 (Miss. 2009), where the Court held that the trial court did not abuse its discretion in finding "good cause" for delay where there was "at least reasonably diligent efforts" to locate and serve the defendant. Here, there were **absolutely no efforts to serve** the defendants (whose locations where known) within the allotted time. The present case shows even less diligence than that found in *Stutts v. Miller*, No. 2008-CA-01866-SCT (¶ 15), 2010 WL 963168, at *5 (Miss. Mar. 18, 2010), where the Court held that the trial court did not err in finding a lack of "good cause" for delay where the plaintiff submitted evidence of her efforts to locate and effect service on the defendants but failed to request an extension. In the case *sub judice*, not only did Buckner not request another extension, but he presented no evidence of any effort to serve the School District or Funchess.

Therefore, because Buckner failed to show "good cause" as to why he failed to serve either the School District or Funchess with process within the additional 120 days granted by the trial court, the trial court should have dismissed his Complaint. Furthermore, because the statute of limitations had long-since expired, the dismissal of Buckner's Complaint should have been with prejudice.

CONCLUSION

Buckner, failed to serve either the School District or Funchess with process before the expiration of the 120-day period after the filing of his Complaint as required by Rule 4(h) of the *Mississippi Rules of Civil Procedure*, and failed to show sufficient evidence of "good cause" for his failure to serve process during this time. Thus, the trial court's decision to give Buckner an additional 120 days rather than dismiss his Complaint with prejudice as a result of the expiration of the statute of limitations was an abuse of discretion. The trial court again abused its discretion by finding "good cause" for Buckner's failure to serve either the School District or Funchess with process before the expiration of the additional 120-day period which the trial court had improperly given to him. Therefore, Defendants/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 3rd day of June, 2010.

RESPECTFULLY SUBMITTED,

COPIAH COUNTY SCHOOL DISTRICT AND KENNETH FUNCHESS

BY: _____

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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,
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P.O. Box 117
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THIS, the 3rd day of June, 2010.

JOSEPH W. GILL