

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOROTHY M. SYKES

APPELLANT

VS.

NO. 20110-CA-00913

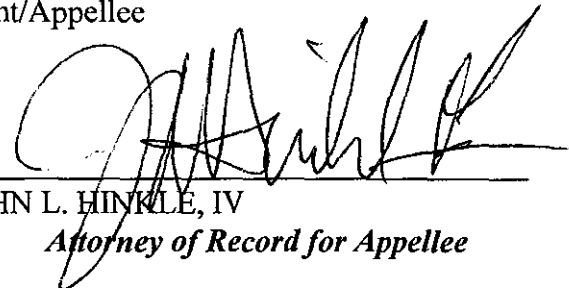
HOME HEALTH CARE AFFILIATES, INC.

APPELLEE

I. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellee, Home Health Care Affiliates, Inc., certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal.

- a. Dorothy Sykes, Plaintiff/Appellant;
- b. Zelp Gambleton, Defendant;
- c. Home Health Care Affiliates, Inc., Defendant/Appellee;
- d. Carter Dobbs, Jr., Counsel for Plaintiff/Appellant;
- e. John L. Hinkle, IV, Counsel for Defendant/Appellee



JOHN L. HINKLE, IV
Attorney of Record for Appellee

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IV. STATEMENT OF THE CASE

On or about May 8, 2006, Sykes was operating a vehicle in Columbus, Lowndes County, Mississippi, when a vehicle owned by Home Health Care Affiliates, Inc. (“Home Health”) and driven by its employee, Zelp Gambleton, collided with Sykes’ vehicle (**R. AT VOLUME II, 8-14**). Three (3) years later, on May 8, 2009, Sykes filed suit against Home Health and Zelp Gambleton (**R. AT VOLUME II, 3-6**). The Complaint specifically alleged that Mr. Gambleton negligently and carelessly operated his vehicle; negligently and carelessly failed to keep a proper lookout; and negligently and carelessly failed to avoid a collision with Sykes’ vehicle (**R. AT VOLUME II, 4**). The only allegations against Home Health were based on vicarious liability for the actions of its driver, Mr. Gambleton (**R. AT VOLUME II, 3-6**)(**APPELLANT’S BRIEF, AT 2**).

Home Health was timely served with a copy of the Complaint and timely filed its Answer and Defenses (**R. AT VOLUME II, 8-14**). Mr. Gambleton was never served in the action (**APPELLANT’S BRIEF, AT 2**). On September 28, 2009, Home Health filed its Motion for Summary Judgment (**R. AT VOLUME II, 15-27**). On April 23, 2010, the County Court entered its Order and Opinion Granting Separate Defendant Home Health Care Affiliates, Inc.’s Motion for Summary Judgment and Directing a Final Judgment of Dismissal with Prejudice (**R. VOLUME II, 40-45**). Sykes appealed the ruling to the Circuit Court of Lowndes County, Mississippi (**R. AT VOLUME II, 46-47**). On May 26, 2011, the Circuit Court of Lowndes County, Mississippi, affirmed the ruling of the County Court (**R. AT VOLUME I, 50**). From this ruling, Sykes has filed her appeal with the Mississippi Supreme Court.

V. SUMMARY OF THE ARGUMENT

Sykes filed her Complaint against Home Health and its employee, Zelp Gambleton. The only allegations against Home Health were based solely on vicarious liability for the actions of its employee, Mr. Gambleton. While Home Health was timely served with process, Mr. Gambleton was never served with process. Further, Sykes never requested an extension of time to serve Mr. Gambleton. As Mr. Gambleton was not timely served within the 120 days allotted under Rule 4(h) of the Mississippi Rules of Civil Procedure, the statute of limitations as to Mr. Gambleton ran. Pursuant to established case law, as the claims against Home Health were wholly derivative of the actions of its employee, Zelp Gambleton, the claims against Home Health are likewise barred. Given that there was no way around the operation of established case law, Sykes contends that she established “good cause” for failure to serve Mr. Gambleton. However, the trial court reviewed the evidence presented by Sykes and determined that she had failed to establish “good cause.” As Sykes never established “good cause” for failing to serve Mr. Gambleton, the statute of limitations ran as to Mr. Gambleton, and the derivative action against Home Health is likewise barred.

VI. ARGUMENT

The facts in the present action are largely undisputed. Sykes initially sued both Zelp Gambleton and Home Health. However, Sykes never served Mr. Gambleton in the action. Sykes only allegations against Mr. Gambleton's employer, Home Health, are based on vicarious liability for the alleged negligence of Mr. Gambleton (**APPELLANT'S BRIEF, AT 2**).

Sykes freely admits that the County Court was correct in its ruling that the statute of limitations has run as to her claims against Zelp Gambleton (**APPELLANT'S BRIEF, AT 7**). However, in an effort to circumvent this undisputed fact, Sykes confusingly argues that the claims against Home Health are not barred simply because she named Mr. Gambleton in the initial pleadings and exercised "due diligence" in her attempts to serve Mr. Gambleton.

In support of her arguments, Sykes seeks to distinguish her case from *J&J Timber Co. v. Broome*, 932 So. 2d 1 (Miss. 2006); *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778 (Miss. 1991); and *Smith v. Taylor Propane, Inc.*, 2009 U.S. Dist. LEXIS 56074 (S.D. Miss. June 26, 2009). These arguments are addressed more fully below.

A. DERIVATIVE ACTIONS

The Mississippi Supreme Court has stated that "a person named as a defendant in a declaration (complaint) does not become a party until served with process." *Stanley v. Allstate Ins. Co.*, 465 So. 2d 1023, 1025 (Miss. 1985). As stated above, it is undisputed that Sykes did not timely serve Zelp Gambleton within the 120 days allotted under Rule 4 of the Mississippi Rules of Civil Procedure (**APPELLANT'S BRIEF, AT 4**). Thus, as Mr. Gambleton was never served, he never began a party to the suit. Further, it is undisputed that the only action that Sykes asserted against Home Health is vicariously through the actions of its driver, Zelp Gambleton (**APPELLANT'S BRIEF, AT 2**). As such, the allegations contained in the Complaint against Home

Health are wholly derivative in nature. At no point in Sykes's pleadings does she dispute this contention.

In *J&J Timber Co. v. Broome*, 932 So. 2d 1, 6 (Miss. 2006), the Mississippi Supreme Court held that “[a]n action against an employer based on the doctrine of *respondeat superior* is a derivative claim arising solely out of the negligent conduct of its employee within the scope of his or her employment.” In *Broome*, the plaintiff settled with the employee, released him, and then sued the employer. The Court held that once the plaintiff discharged the employee, the purely derivative claim against the employer, J&J Timber, became barred. *Id.* The Court held that “[t]here is no assessment of damages against the employer when no action can be brought against the only negligent party-the employee.” *Id.* (emphasis added). See also *Guiher v. Custom Woodworks, Inc.*, 2009 U.S. Dist. LEXIS 104150 at *4-5 (S.D. Miss. November 3, 2009); *Crawford Logging, Inc. v. The Estate of Roswell Irving, Jr., Deceased*, 41 So. 3d 687, 691 (Miss. 2010).

Sykes argues that *Broome* is distinguishable in that the plaintiff in *Broome* released the employee from the suit. Sykes is correct that those are indeed the facts of *Broome*. However, the holding in *Broome* is in no way limited by the characterization Sykes attempts to make. Rather, the Court specifically stated that when one cannot bring an action against the negligent party, the employee, there can be no assessment of damages against the employer. This is because when a claim is based solely on the negligence of the employee, and the claim against the employee is barred, the derivative action against the employer is likewise barred. It does not matter if Sykes released Zelp Gambleton or if she simply failed to serve him. The seminal element in the holding in *Broome* is that Sykes is barred from bringing an action against Home Health's employee, Zelp Gambleton. Since her only claim against Home Health is for vicarious

liability, she is now equally barred in her claim against the employer, Home Health.

The attempted characterization by Sykes of *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778 (Miss. 1991), is even more suspect than her attempts to sidestep *Broome*. In *Lowery*, the statute of limitations had expired against a nurse defendant pursuant to statute. The plaintiff also sued the nurse's employer. *Id.* The Court stated that "[i]t is generally held that a suit barred by a statute of limitations against an agent will likewise bar the same claim against the principal whose liability is based solely upon the principal agent relationship, and not some act or conduct of the principal separate and apart from the act or conduct of the agent." *Id.* While the holding in *Lowery* appears to be directly on point with the issues in the case at bar, Sykes contends that *Lowery* is somehow different because she actually named the employee, Zelp Gambleton, in the suit before the statute of limitations had expired. However, this argument is disingenuous at best. Simply because Sykes named Mr. Gambleton in the suit clearly does not prevent the statute of limitations from running. This has never been the law in Mississippi. Zelp Gambleton does not become a party to the lawsuit until he is named and served with process. However, by Sykes' own admission, service was not accomplished on Mr. Gambleton. Thus, just as in *Lowery*, the statute of limitations now bars the claim against Home Health's employee, Zelp Gambleton. *Lowery* clearly supports the conclusion that since the claim against Home Health is wholly based on derivative liability for the actions of its employee, the claim against Home Health is likewise barred.

Similarly, in *Rick Bounds Auto Sales, Inc. v. Western Heritage Ins. Co.*, 2009 U.S. Dist. LEXIS 90269 at *2 (S.D. Miss. September 30, 2009), the plaintiff sued an insurance company and its agent. The Court held that the statute of limitations as to the agent had run. *Id.* at *5. The Court noted that "[i]t is generally held that a suit barred by a statute of limitation

against an agent will likewise bar the same claim against the principal whose liability is based solely upon the principal and agency relationship, and not some act or conduct of the principal separate and apart from the act or conduct of the agent.” *Id.* The Court held that as the statute of limitations had run against the agent, the plaintiff’s claims against the principal were likewise barred. *Id.* at *5-6.

Finally, Sykes attempts to distinguish the holding in *Smith v. Taylor Propane, Inc.*, 2009 U.S. Dist. LEXIS 56074 at *2 (S.D. Miss. June 26, 2009). In *Taylor Propane*, the plaintiff dismissed the employee driver of the vehicle following a motion by the defendant asserting lack of diversity. The defendant promptly filed a motion to dismiss on behalf of the employer contending that the allegations were solely based on *respondeat superior*. *Id.* The Court examined the holding in *Broome* stating that “Unfortunately, the plaintiff has dismissed the only actor against whom she made negligence claims, i.e. [the driver]. The only avenue for recovery against [the employer] for the claims is through vicarious liability. That avenue is foreclosed by the holding in *J&J Timber*.” *Id.* at *6. Sykes again contends that somehow *Taylor Propane* is different because she did not voluntarily dismiss the employee, Zelp Gambleton (**APPELLANT’S BRIEF, AT 10**). However, this distinction is not germane to the central holding of *Taylor Propane*, *Lowery*, or *Broome*. It does not matter why the claim against the employee, Zelp Gambleton, is barred. The point is that the claim against Mr. Gambleton **is barred**. Give that the only claims for negligence were made against Mr. Gambleton, the only avenue for recovery against Home Health is through vicarious liability. Sykes asserted a wholly derivative action against Home Health. As the underlying action (claims for negligence against Zelp Gambleton) is barred, the claims against Home Health are likewise barred.

Other than Sykes’ half-hearted attempts to distinguish the clear holdings of *Lowery*,

Broome, and *Taylor Propane*, Sykes has also wholly failed to provide any established case law to support her arguments.

As the claims against Mr. Gambleton are barred, and the only claim against Home Health is based solely on vicarious liability, the claim against Home Health is barred as well by operation of law.

B. SERVICE OF PROCESS

While Sykes admits that she agrees with the County Court's ruling that the statute of limitations has run against Zelp Gambleton, she goes on to argue that she had "good cause" for failure to serve process on Mr. Gambleton.

Pursuant to Rule 4(h) of the Mississippi Rules of Civil Procedure, Sykes must effect service upon a defendant within 120 days of the filing of her Complaint. Sykes filed her action on May 8, 2009, three (3) years to the day after the accident at issue. While the filing of the Complaint tolled the statute of limitations for 120 days, since service was not perfected during that time period, at the expiration of the 120 days, the statute of limitations began to run. *See Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1185 (Miss. 2002); *Young v. Hooker*, 753 So. 2d 456, 460 (Miss. Ct. App. 1999).

As Rule 4(d) of the Mississippi Rules of Civil Procedure states "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 time period, the action shall be dismissed..."

The Mississippi Court of Appeals has stated that "The plaintiff bears the burden to demonstrate the existence of good cause for failure to timely serve process." *Whitten v. Whitten*, 956 So. 2d 1093, 1096-97 (Miss. Ct. App. 2007). The Mississippi Court of Appeals has also

stated that “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. The excusable neglect standard is a very strict standard.” *Spurgeon v. Egger*, 989 So. 2d 901, 907 (Miss. Ct. App. 2007). In *Egger*, the Court also stated that “‘Good cause’ can never be demonstrated where plaintiff has not been diligent in attempting to serve process. In demonstrating good cause and diligence, a plaintiff must show that he or she has been unable to serve process because the defendant evaded process or engaged in misleading conduct, or for some other acceptable reason.” *Id.*

It is undisputed that Sykes never filed a request for an extension of time to serve process on Mr. Gambleton. While a motion for extension of time is not fatal to Sykes’ showing of good cause, the Mississippi Supreme Court has stated that a plaintiff who files a motion for extension of time before the expiration of the service period is “more likely [to] succeed in demonstrating diligence than a plaintiff who does nothing.” *Montgomery v. SmithKline Beecham Corp.*, 910 So. 2d 541, 546 (Miss. 2005). Clearly, Sykes, in the present action, chose to do nothing. Further, Sykes’s efforts in effecting service on Mr. Gambleton can hardly be characterized as laborious. In support of her efforts, Sykes outlined a couple of phone calls between a secretary and the process server over the course of five (5) months. There is absolutely no indication presented by Sykes of “due diligence” or “good cause” other than a smattering of phone calls between the process server and a secretary. This simply does not rise to the level of “due diligence” or “good cause.”

“‘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.” *Foss v. Williams*, 993 So. 2d 378, 379 (Miss. 2008).

— In *Stutts v. Miller*, 37 So. 3d 1, 2 (Miss. 2010), a case very similar to the one at bar, the plaintiff failed to timely serve the defendant within 120 days. As such, the defendant contended that the statute of limitations had run. *Id.* The plaintiff argued that she had established good cause through the submission of ten (10) affidavits. *Id.* at 5-6. The Court specifically noted that the plaintiff failed to request even one (1) extension of time from the trial court. *Id.* at 6. While the Court noted there was no specific rule requiring a motion for additional time to be filed, “a diligent plaintiff should file [a motion for additional time to serve process] within the 120-day time period. Such diligence would support an allegation that good cause exists for failure to serve process timely.” *Id.* The Court went on to state “a plaintiff who - - prior to expiration of the service period - - files a motion representing that he or she has been unable to serve process, will more likely succeed in demonstrating diligence than a plaintiff who does nothing.” *Id.* Further, in a situation very similar to the one in which Sykes found herself, the Court stated “It would be prudent for a diligent plaintiff who files his or her complaint only four days before the running of the applicable statute of limitations at least to file a motion for additional time to serve process if it appears that service or process will not be accomplished within the 120-day period provided by Rule 4(h).” *Id.* In regard to the Court’s review of the finding of the trial court that “good cause” did not exist, the Mississippi Supreme Court stated “A trial court's decision to grant or deny a motion to dismiss is reviewed de novo. However, **‘[t]his 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).’ Only ‘[w]here such discretion is abused or is not supported by substantial evidence’ will this Court reverse.**” *Id.* at 3. The Court upheld the finding of the trial court. *Id.*

In regard to the dismissal by the County Court, it is clear the County Court examined the

facts, pleadings, and arguments of Sykes in regard to the issue of “good cause”. The County Court stated:

It is undisputed that the Plaintiff failed to timely serve Zelp Gambleton. It is also undisputed that the Plaintiff never requested an extension of time to serve process on Mr. Gambleton. The evidence presented by the Plaintiff only indicates that a total of two phone calls were made to the process server within the 120 day time frame. Further, it is clear that the Plaintiff was aware that he had not served process on Zelp Gambleton and failed to file for an extension of time to serve process at any point prior to the running of the 120 days. As such, it is the opinion of this Court that the Plaintiff wholly failed to establish good cause for failure to affect timely service of process on Mr. Gambleton.

(**R. AT VOLUME II, 44**). As Sykes failed to establish “good cause,” the County Court was correct in its finding that the claims against Zelp Gambleton were barred by the statute of limitations.

VII. CONCLUSION

It is undisputed that Sykes filed suit against Home Health based solely on the alleged negligence of its employee, Zelp Gambleton. It is also undisputed that a claim based on vicarious liability is a solely derivative action. Further, it is undisputed that Sykes wholly failed to perfect service on Mr. Gambleton within the 120 days provided by the Mississippi Rules of Civil Procedure. As the accident occurred on May 8, 2006, and the statute of limitations began to run again after the expiration of 120 days, Sykes’s claims against Zelp Gambleton are barred by the applicable statute of limitations. As Sykes asserted no independent claims against Home Health, and the claims against Home Health are entirely derivative of the claims against Zelp Gambleton, Sykes’ claims against Home Health are also barred by operation of Mississippi law. In an effort to circumvent this inevitable conclusion, Sykes argues that she established “good cause” for failure to serve Mr. Gambleton. However, again, it is undisputed that Sykes never requested an extension of time to serve process on Mr. Gambleton, despite the fact that she


wanted until the absolute last minute to file suit. In support of her argument for "good cause," Sykes cited to a total of two (2) phone calls. The trial court clearly reviewed the evidence and determined that the showing of good cause was not met. As such, the Appellate Court should not overturn this finding. Given that "good cause" was not shown for the failure to timely serve Mr. Gambleton, the statute of limitations ran, and the derivative action against Home Health is barred by operation of the law. Thus, the Court should affirm the finding of the trial court.

RESPECTFULLY SUBMITTED this the 22nd day of March, 2012.

HOME HEALTH CARE AFFILIATES, INC.

BY: 

JOHN L. HINKLE, IV

JOHN L. HINKLE, IV - MSB# 
MARKOW WALKER, P.A.
Post Office Drawer 50
Oxford, Mississippi 38655
Telephone: (662) 234-9899
Facsimile: (662) 234-9762
E-mail: jhinkle@markowwalker.com

CERTIFICATE OF SERVICE

I, John L. Hinkle, IV, do hereby certify that a copy of the above and foregoing *Brief of the Appellee Home Health Care Affiliates, Inc.* has this day been sent, via United States mail, postage pre-paid, to:

Carter Dobbs, Jr., Esq.
103 2nd Ave. North
P.O. Box 517
Amory, MS 38821
Counsel for the Plaintiff

Honorable Beverly Mitchell Franklin
Lowndes County Court Judge
P.O. Box 1829
Columbus, MS 39703

Honorable Lee Howard
Lowndes County Circuit Court Judge
P.O. Box 1344
Starkville, MS 39760

This, the 22nd day of March, 2012.



JOHN L. HINKLE, IV