

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

DOROTHY M. SYKES-----APPELLANT

VS.

NO. 2011-CA-00913

HOME HEALTH CARE AFFILIATES, INC-----APPELLEE

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**ON APPEAL FROM THE CIRCUIT COURT  
OF LOWNDES COUNTY MISSISSIPPI**

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**APPELLANT'S BRIEF**

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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 this Court may evaluate possible disqualifications or recusal.

Dorothy Sykes	-	Plaintiff/Appellant
Zelp Gambleton	-	Defendant
Home Health Care Affiliates, Inc.	-	Defendant/Appellee
Carter Dobbs, Jr.	-	Attorney for Plaintiff/Appellant
John L. Hinkle, IV	-	Attorney for Defendant/Appellee Home Health Care Affiliates, Inc.
Beverly Franklin	-	Lowndes County County Court Trial Judge
Lee Howard	-	Circuit Court Judge on Appeal

  
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## **I. APPELLANT'S STATEMENT OF THE ISSUES**

- ISSUE 1: WHETHER APPELLANT/PLAINTIFF DOROTHY SYKES HAD GOOD CAUSE FOR NOT SERVING DEFENDANT ZELP GAMBLETON WITH PROCESS
- ISSUE 2: WHETHER THIS CAUSE OF ACTION AGAINST DEFENDANT/APPELLEE HOME HEALTH CARE AFFILIATES, INC. IS NOW BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST ITS EMPLOYEE, DEFENDANT ZELP GAMBLETON
- ISSUE 3: WHETHER IT WAS NECESSARY THAT DEFENDANT ZELP GAMBLETON BE SERVED WITH PROCESS

## **II. STANDARD OF REVIEW**

The standard of review by this Court in this case is *de novo*, because the appeal involves a question of law. *Zweber v. Zweber*, 2010-CA-01629-COA (¶14) (Miss. Ct. App. 2012), *Price v. Price*, 22 So.3d 331, 332 (¶8) (Miss. CT. App. 2009).

## **III. APPELLANTS' STATEMENT OF THE CASE**

### **(A) NATURE OF THE CASE.**

The allegations presented by the Plaintiff in her Complaint in this case against Defendant Home Health Care Affiliated, Inc. are based upon the doctrine *respondeat superior* for the actions of its employee, Defendant Zelp Gambleton. Unsuccessful attempts were made to serve

Zelp Gambleton with process. The issues in this case are (1) whether Appellant/Plaintiff Dorothy Sykes had good cause for not serving Defendant Zelp Gambleton with process, (2) whether the cause of action in this case against Defendant/Appellee Home Health Care Affiliates, Inc. is now barred by the running of the statute of limitations against its employee, Defendant Zelp Gambleton and (3) whether it was necessary that Defendant Zelp Gambleton be served with process.

(B) COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Plaintiff/Appellant in this case will be referred to as "Dorothy Sykes."

Defendant/Appellee will be referred to as "Home Health."

Dorothy Sykes instituted this action on May 8, 2009 against Home Health and Zelp Gambleton. This action arises from a motor vehicle accident that occurred on or about May 8, 2006, in which Zelp Gambleton, in the course and scope of his employment with Home Health, allegedly struck the rear of the vehicle occupied by Dorothy Sykes. As a result, Dorothy Sykes alleged that she suffered personal injuries. The only allegations presented in the Complaint against Home Health are based on the doctrine of *respondeat superior* for the actions of its employee, Zelp Gambleton. Home Health was timely served within the 120 days allowed by Rule 4(h) of the Mississippi Rules of Civil Procedure. As of the date of the hearing on Home Health's Motion For Summary Judgment, Defendant Zelp Gambleton had not been served. Home Health filed a Motion For Summary Judgment in the County Court below, which Motion

was sustained by 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.

Dorothy Sykes appealed the County Court 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 to the Circuit Court of Lowndes County, Mississippi. On May 26, 2011 the Lowndes County Circuit Court entered an Order Affirming Judgment, affirming the County Court 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. It is from this Order Affirming Judgment that Appellant Dorothy Sykes has filed this appeal.

(C) STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW.

(1) On May 8, 2009, Dorothy Sykes was the occupant of an automobile being driven on Highway 45 in Lowndes County, Mississippi. A motor vehicle accident occurred, in which Defendant Zelp Gambleon, in the course and scope of his employment with Home Health, allegedly struck the rear of the vehicle occupied by Dorothy Sykes.

(2) Dorothy Sykes filed suit in Lowndes County County Court, alleging that she suffered personal injuries. (County Court R. 3) Dorothy Sykes alleges that Home Health is liable for her injuries based upon the doctrine of *respondeat superior* for the actions of its employee, Zelp Gambleton.

(3) Home Health was timely served within the 120 days allowed under Rule 4(h) of the Mississippi Rules of Civil Procedure. (County Court R. 18; R. E. 8) As of the date of the hearing on Home Health's Motion For Summary Judgment, Defendant Zelp Gambleton had not been served.

(4) Several attempts were made by the Lowndes County Sheriff's department to serve Defendant Zelp Gambleton with process. These attempts were unsuccessful. These facts were established by the Affidavit attached as an Exhibit to Plaintiff's Memorandum In Support Of Response To Separate Defendant Home Health Care Affiliates, Inc.'s Motion For Summary Judgment. (Supplemental Record; R. E. 21)

(5) Home Health filed a Motion For Summary Judgment (County Court R. 15; R. E. 5), which Motion was sustained by 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. (County Court R. 40; R. E. 28) The County Court Judge ruled that (1) the action against Home Health is now barred by the running of the applicable statute of limitations against its employee, Zelp Gambleton; and (2) the Plaintiff did not establish good cause for failing to timely serve Zelp Gambleton within the 120 days provided by Rule 4(h) of the Mississippi Rules of Civil Procedure.

(6) The County Court 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 was appealed to the Circuit Court of Lowndes County. On May 26, 2011 the Lowndes County Circuit Court entered an Order Affirming Judgment, affirming the County Court 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. (Circuit Court R. 50; R. E. 34)

#### **IV. SUMMARY OF APPELLANT'S ARGUMENT**

##### **WHETHER THE APPELLANT/PLAINTIFF DOROTHY SYKES HAD GOOD CAUSE FOR NOT SERVING DEFENDANT ZELP GAMBLETON WITH PROCESS**

The Plaintiff, Dorothy Sykes, established good cause for not serving Zelp Gambleton.

The finding of the County Court Judge to the contrary is subject to *de novo* review by this Court.

##### **WHETHER THIS CAUSE OF ACTION AGAINST DEFENDANT/APPELLEE HOME HEALTH CARE AFFILIATES, INC. IS NOW BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST ITS EMPLOYEE, DEFENDANT ZELP GAMBLETON**

##### **WHETHER IT WAS NECESSARY THAT DEFENDANT ZELP GAMBLETON BE SERVED WITH PROCESS**

Because the above two issues are intertwined, in fact and law, they are addressed in this Brief together.

It was not necessary in this case that Home Health's employee, Zelp Gambleton, be served with process in order for the suit to proceed against Home Health because reasonable efforts were made to serve process upon Defendant Zelp Gambleton. Since reasonable efforts were made to serve Defendant Zelp Gambleton, the cause of action Home Health is not barred by the running of the statute of limitations against its employee, Zelp Gambleton. The Plaintiff established good cause for failure to serve Zelp Gambleton.



## **V. APPELLANT'S ARGUMENT**

### **ISSUE 1: WHETHER APPELLANT/PLAINTIFF DOROTHY SYKES HAD GOOD CAUSE FOR NOT SERVING DEFENDANT ZELP GAMBLETON WITH PROCESS**

Appellant/Plaintiff Dorothy Sykes clearly had good cause for not serving Defendant Zelp Gambleton with process because she made diligent efforts to do so. The County Court Judge was clearly in error in finding otherwise. Service of process was attempted by diligent efforts of the Plaintiff. Process for Defendant Zelp Gambleton was issued on May 8, 2009. This process was forwarded to the Lowndes County Sheriff for service on June 22, 2009. On July 8, 2009 the secretary for Plaintiff's attorney spoke by telephone with Lowndes County deputy sheriff Mike Lollar. Mike Lollar stated that he had been to the address of Zelp Gambleton set out in the accident report several times; that a female at that address stated that Zelp Gambleton would occasionally come by that address; that Mike Lollar left his card to be given to Zelp Gambleton with a request for him to call Mike Lollar. Mike Lollar stated he would call Plaintiff's attorney's office and let them know how the attempted service of process was going. Mike Lollar stated that he served Zelp Gambleton one other time in another case and that he, Zelp Gambleton, did contact Mike Lollar after he had left his telephone number. Plaintiff's counsel's secretary called again on July 15, 2009 and spoke again with Mike Lollar, who stated that he had called the female at the address that was Zelp Gambleton's address and that she stated that she had given him the deputy sheriff's card. These facts were established by the Affidavit of Dorothy Sykes' attorney that is attached as an Exhibit to Plaintiff's Memorandum In Response To Home Health's Motion For Summary Judgment. (Supplemental Record; R. E. 21)

ISSUE 2:      WHETHER THIS CAUSE OF ACTION AGAINST DEFENDANT/APPELLEE HOME HEALTH CARE AFFILIATES, INC. IS NOW BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST ITS EMPLOYEE, DEFENDANT ZELP GAMBLETON

ISSUE 3:      WHETHER IT WAS NECESSARY THAT DEFENDANT ZELP GAMBLETON BE SERVED WITH PROCESS

Because the above two issues are intertwined, in fact and law, they are addressed in this Brief together.

Plaintiff Dorothy Sykes agrees with the lower Court's Order and Opinion that the statute of limitations had run against Defendant Zelp Gambleton. However, for the reasons set out below, this does not affect the continued prosecution of the suit of Dorothy Sykes against Defendant Home Health Care Affiliates, Inc. The County Court in its Opinion cites the case of *J&J Timber Co. v. Broome*, 932 So.2d 1 (Miss. 2006). In this case, the Plaintiff settled with the employee, and released him, and then sued the employer. The Court held that once the Plaintiff discharged the employee from the law suit, the purely derivative claim against the employer became barred. Dorothy Sykes agrees with this holding. However, in the case in bar, Zelp Gambleton was not released; he was simply not served with process after diligent efforts to do so.

The lower Court cites in its Opinion the case *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778, 780 (Miss. 1991). In this case the statute of limitations had already expired against a nurse-employee Defendant pursuant to the statute. The Plaintiff in *Lowery* had also sued the nurse's employer, but only after the statute of limitations had run as to the employee.

The County Court, in its Order and Opinion Granting Home Health's Motion For Summary Judgment (County Court R. 40; R. E. 28), cites the following language in *Lowery* as the basis for the ruling that the failure to serve process upon Defendant Zelp Gambleton also bars suit against Defendant Home Health:

[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.

The facts and the law in *Lowery v. Statewide Healthcare Serv., Inc.* are simply not the same as in this case at bar. In *Lowery*, the statute of limitations against the employee had expired before suit was filed against the employer. This is not the case with Defendant Home Health. In the case at bar, service of process was attempted by diligent efforts of the Plaintiff. Process for Defendant Zelp Gambleton was issued on May 8, 2009. This process was forwarded to the Lowndes County Sheriff for service on June 22, 2009. On July 8, 2009 the secretary for Plaintiff's attorney spoke by telephone with Lowndes County deputy sheriff Mike Lollar. Mike Lollar stated that he had been to the address of Zelp Gambleton set out in the accident report several times; that a female at that address stated that Zelp Gambleton would occasionally come by that address; that Mike Lollar left his card to be given to Zelp Gambleton with a request for him to call Mike Lollar. Mike Lollar stated he would call Plaintiff's attorney's office and let them know how the attempted service of process was going. Mike Lollar stated that he served Zelp Gambleton one other time in another case and that he, Zelp Gambleton, did contact Mike Lollar after he had left his telephone number. Plaintiff's counsel's secretary called again on July

15, 2009 and spoke again with Mike Lollar, who stated that he had called the female at the address that was Zelp Gambleton's address and that she stated that she had given him the deputy sheriff's card. These facts were established by the Affidavit of Dorothy Sykes' attorney that is attached as an Exhibit to Plaintiff's Memorandum In Response To Home Health's Motion For Summary Judgment. (Supplemental Record; R. E. 21)

Not attempting service of process within the 120 day time set out by Rule 4(h) of the Mississippi Rules of Civil Procedure, and the statute of limitations then expiring as to an employee, is simply not the same as what has happened in the case at bar. As set out above, diligent efforts were made to effect service of process upon the employee, Zelp Gambleton. The County Court in its Order and Opinion Granting Home Health Care's Motion For summary Judgment (County Court R. 40; R. E. 28), and Defendant Home Health in its Memorandum In Support Of Motion For Summary Judgment (County Court R. 24; R. E. 14), cite no statute, Court case or Rule that requires service of process in a case such as this upon an employee Defendant. Defendant Home Health in this case argued in its Memorandum In Support Of Motion For Summary Judgment, (County Court R. 24; R. E. 14) and the lower Court held, that since Defendant Zelp Gambleton is a necessary party, it is necessary that process be effected upon him. Again, Defendant Home Health in its Memorandum and the County Court cite no statute, case or Rule in support of this argument.

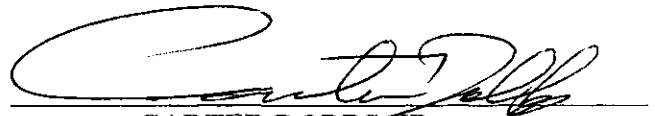
The lower Court in its Order and Opinion granting Motion For Summary Judgment (County Court R. 40; R. E. 28) cites *Smith v. Taylor Propane, Inc.*, 2009 U.S. Dist. LEXIS 56074 (S.D. Miss. June 26, 2009). In this case, the Plaintiff dismissed the employee driver of the vehicle following a motion by the Defendant asserting lack of diversity. The

Defendant promptly filed a Motion to Dismiss, contending that the allegations were solely based upon *respondeat superior*. The Defendant's employer was then dismissed by the Court because the only avenue for recovery against the employer for the claims was through vicarious liability. This case is readily distinguishable, because in the case at bar, Dorothy Sykes did not dismiss the employee driver, Zelp Gambleton. Process simply was not served upon him after diligent efforts to do so.

## VI. CONCLUSION

For the reasons set out above, this Court should render a decision reversing the decision of the County Court Judge and Circuit Judge sustaining Defendant Home Health Care Affiliates, Inc. Motion for Summary Judgment and remanding the case to the lower Court for trial.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Carter Dobbs, Jr., attorney for the Appellant, do hereby certify that I have, on this the 24<sup>th</sup> day of March, 2012, mailed by United State Postal Service, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to Honorable John L. Hinkle, IV, attorney for Appellee Home Health Care Affiliates, Inc. at his usual mailing address of Markow Walker, P.A., Post Office Drawer 50, Oxford, Mississippi 38655.

  
CARTER DOBBS, JR.

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

DOROTHY M. SYKES-----APPELLANT

VS.

NO. 2011-CA-00913

HOME HEALTH CARE AFFILIATES, INC-----APPELLEE

**CERTIFICATE OF SERVICE**

I, Carter Dobbs, Jr., attorney for the Appellant, do hereby certify that I have, on this the 9th day of March, 2012, mailed by United State Postal Service, postage prepaid, a true and correct copy of the following to Honorable Beverley Franklin, Lowndes County County Court Judge, at her usual mailing address of Post Office Box 1829, Columbus, Mississippi 39703 and to Honorable Lee Howard, Circuit Court Judge on Appeal, at his usual mailing address of Post Office Box 1344, Starkville, Mississippi 39760:

1. Appellant's Brief
2. Appellant's Record Excerpts

  
CARTER DOBBS, JR.