

IN THE COURT OF APPEALS 9/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01276 COA

**MINNIE FERGUSON DUNSON AS NEXT OF KIN OF ROMAN S. FERGUSON,
DECEASED**

APPELLANT

v.

EMED CO., INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

BENNIE L. JONES, JR.

ATTORNEY FOR APPELLEE:

ROBERT F. STACY, JR.

NATURE OF THE CASE: CIVIL - SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: WRONGFUL DEATH ACTION DISMISSED

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

This is an appeal from the Circuit Court of Winston County, wherein Minnie Ferguson Dunson filed a complaint against EMED for the wrongful death of her husband, Roman S. Ferguson. The trial court granted EMED's motion for summary judgment. Finding no error, we affirm.

I.

On July 15, 1986, Roman S. Ferguson was injured when he slipped and fell against a sign located in front of the post office in Louisville. The sign was allegedly manufactured by EMED Co., Inc. Ferguson suffered a severed radial artery and died on July 26, 1986, eleven days later.

On August 30, 1990, Minnie Ferguson Dunson, wife and next of kin of Roman S. Ferguson, filed a complaint against the City of Louisville and the United States Postal Service. On November 16, 1990, Dunson filed a motion to amend the complaint to add John Does One through Ten.

On July 14, 1992, one day before the expiration of the statute of limitations, Dunson filed a separate complaint against EMED and John Does One through Ten. Dunson alleged *inter alia* that (1) that while engaged in the manufacture and sale of signs and component parts, John Does One through Ten and EMED sold certain signs and component parts to the City of Louisville, and/or the United States Post Office in Louisville, where these signs were installed in front or near the post office located in Louisville; (2) that the Defendants expected the signs sold to reach the purchasers and/or users in the condition in which they were sold; (3) that the City of Louisville and/or the post office installed said signs and component parts in front or near the post office; and (4) that on or about July 15, 1986, Roman S. Ferguson was fatally injured when he slipped upon a defective sidewalk in front of the Louisville, Mississippi United States Post Office; and (5) that eleven days later, Ferguson died of a severed radial artery. Dunson requested compensation for damages suffered as a result of the wrongful death of Ferguson, together with all court costs.

On October 12, 1992, The City of Louisville filed a motion to consolidate its action with the action filed against EMED Co. and John Does One through Ten. Six months later, the trial court approved the agreed order entered into by the City of Louisville and Dunson to consolidate the actions. The trial court gave the parties fourteen days to file the second amended complaint. On May 11, 1993, Dunson filed the second amended complaint consolidating the actions.

On May 27, 1993, the City of Louisville filed its answer and affirmative defenses to the second amended complaint. On September 3, 1993, process was issued by the Circuit Clerk of Winston County, Mississippi, for EMED.

On October 18, 1993, the trial court granted EMED's request for additional time within which to answer to the second amended complaint filed by Dunson on May 11, 1993, or otherwise specially appear. EMED reserved all jurisdictional and/or venue or other defenses to which it was entitled.

On November 8, 1993, EMED filed its answer and defenses to the second amended complaint. In addition to denying liability for Ferguson's death, EMED affirmatively asserted all defenses available

as set forth in Mississippi Rule of Civil Procedure 12(b)(1) through 12(b)(7). EMED further alleged that the cause of action against it was barred by the statute of limitations under the provisions of section 15-1-49 of the Mississippi Code of 1972.

On March 15, 1994, EMED filed a motion to dismiss wherein it requested that the complaint against it be dismissed pursuant to Rules 4(h), 12(b)(4) and (5) of the Mississippi Rules of Civil Procedures. On March 21, 1994, Dunson filed her response to the motion to dismiss wherein she requested that the trial court deny the motion. In denying EMED's motion to dismiss, the trial court found that EMED having entered a general appearance on November 8, 1993, by filing its answer and defenses to the second amended complaint, subjected itself to the jurisdiction of the court, thereby waiving all objections to improper or insufficient service of process. *See Hurst v. Southwest Miss. Legal Servs Corp.*, 610 So. 2d 374, 387 (Miss. 1992).

On September 6, 1994, EMED filed a motion for summary judgment based on its statute of limitations defense. EMED asserted that the Plaintiff's cause of action accrued on July 15, 1986, and thus under section 15-1-49, as applied to actions accruing prior to July 1, 1989, Plaintiff's claims would be barred by the statute of limitations unless brought within six years after July 15, 1986. EMED alleged that upon filing the complaint on July 14, 1992, Plaintiff's representative directed the circuit clerk not to issue summons and process at that time. EMED further alleged that summons or process was not issued until September 3, 1993. Along with its motion for summary judgment, EMED included an affidavit from Henry Dean Horton, circuit clerk, asserting that when the Plaintiff filed the complaint on July 14, 1992, Plaintiff's representative requested the circuit clerk not to serve the summons on EMED.

In her response to the motion for summary judgment, Dunson denied that EMED was entitled to summary judgment on the grounds stated in the motion. In her memorandum in opposition to the motion for summary judgment, Dunson argued that under the Mississippi Rules of Civil Procedure, the date of the filing of the complaint tolls the statute of limitations, not the date on which summons or process was issued on the Defendant(s).

On October 31, 1994, the trial court entered its order granting EMED's motion for summary judgment. It is from the trial court's order granting EMED's motion for summary judgment that Dunson perfected this appeal.

II.

The rules of procedure provide that a circuit action is commenced by filing a complaint with the court. M.R.C.P 3(a). The filing of the complaint tolls the statute of limitation. *Erby v. Cox*, 654 So. 2d 503, 504 (Miss. 1995).

However, Rule 3(a) must be read in conjunction with Rule 4(h). Rule 4(h) mandates dismissal of a complaint if process has not been served within 120 days, unless the party on whose behalf service was required shows good cause for failing to serve within the period. M.R.C.P. 4(h).

If process has not been completed within 120 days and the party has not shown good cause for failing to serve process within the period, the action shall be dismissed. M.R.C.P. 4(h). Once the action is dismissed, the statute of limitations continues to run.

Dunson filed her complaint against EMED, one day prior to the expiration of the statute of limitation. No process was issued for EMED until 416 days after Dunson filed her complaint, and the court had not extended the time for completing service of process. In the absence of such an extension of time, the statute of limitations continued to run.

For the foregoing reasons, the judgment of the trial court is affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF WINSTON COUNTY IS AFFIRMED.
APPELLANT IS TAXED WITH ALL COSTS OF THIS APPEAL.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ,
McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**