

THE LAW OFFICES  
OF  
SUSAN K. STEADMAN, PLLC  
ATTORNEY AT LAW  
POST OFFICE BOX 455  
HATTIESBURG, MISSISSIPPI 39403-0455  
(601) 544-1111  
FAX # (601) 582-9078

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Mississippi Supreme Court  
Attention: Civil Practice Rules Committee  
P.O. Box 249  
Jackson, MS 39205

DEC 28 2015

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

Dear Justices:

RE: Mississippi Rules of Civil Procedure

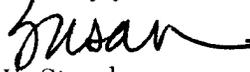
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Thank you for this opportunity to suggest changes to the Mississippi Rules of Civil Procedure.

I have practiced law in Mississippi for thirty-five years. No other procedural construct has caused as much difficulty in my commercial law practice than MRCP 4(h). This Rule needs to be deleted. This Rule is being interpreted in so many different ways across the state as to make the goal of uniformity impossible.

I have attached a memorandum on this issue which was prepared by my daughter, Amelia Steadman McGowan, when she was a student at Tulane Law School. She now practices in Jackson. This memo outlines the main problems with Rule 4(h). I am sure there are others. I hope this does open the door to consideration of the deletion of MRCP Rule 4(h).

Very sincerely yours,



Susan K. Steadman

SKS/mc  
Enclosure

**I. Facts.**

Rule 4(h) of the Mississippi Code of Civil Procedure is being used by some judges to severely prejudice the rights of plaintiffs, especially in cases with already short statutes of limitations. As Rule 4(h) is currently written, a plaintiff has only 120 days after the filing of the complaint to locate and serve the defendant, or else the action will be dismissed unless the plaintiff can demonstrate good cause why service was not made within that period. Even if the plaintiff does demonstrate good cause, many judges will only grant one or two extensions, which may consist of as little as thirty days (see attached Complaint, Orders Extending Time (2) and Plaintiff's Notes for Trustmark National Bank v. Michael Holifield). Such a practice not only prejudices plaintiffs and often denies them recourse, but it also encourages defendants to escape their responsibilities. Especially in today's increasingly transient society, it is necessary for the current period for service of process to be extended to 180 days, with motions for continuance granted so long as the plaintiff shows good cause why the service of process was not made during that initial period. Such a reform would not prejudice defendants, as it would still limit the time in which a plaintiff could file suit and would require plaintiffs to show good cause for additional time, yet it would allow plaintiffs greater opportunity to achieve the justice they deserve.

**II. Necessity for an initial 180-day period for service of process.**

**A. Increasingly transient nature of modern society.**

A particular challenge to plaintiffs in serving defendants within 120 days is the increasingly transient nature of modern society. With the development of new technologies and the expansion of job markets, individuals seldom remain in one area for an extended time, as many plaintiffs and process servers can attest. Even with modern technologies such as the

internet made available to plaintiffs, defendants may easily evade process either by removing their contact information from directories and/or changing their physical location. The lack of a directory of cellular phone number makes it increasingly difficult to contact debtors. Moreover, neighbors and relatives are often disobliging and may easily mislead plaintiffs. Therefore, the initial 120-day period in which to serve the defendant often prejudices plaintiffs and encourages defendants to evade process as well as their obligations.

**B. Statute of limitations concerns.**

Coupled with the frequency of defendants' process evasion, this current 120 day "window" in which to serve process as provided in Rule 4(h) sometimes leads to unjust results in causes of action with short statutes of limitations, such as default cases. As the Mississippi Court of Appeals noted in *Kingston v. Splash Pools of Mississippi, Inc.* (2005-CA-02257-COA - May 8 2007):

The purpose of the 120-day rule is to provide the plaintiff with an adequate amount of time in which to find the defendant and provide notice of the claim. If the plaintiff is unable to locate or serve the defendant within that time frame, the plaintiff has several options from which to proceed. The plaintiff may request additional time in which to file, dismiss and re-file the claim, or demonstrate to the court good cause as to why the defendant was not properly served within the time allowed. (Paragraph 15)

Although this reasoning may apply to most civil cases, it provides virtually no comfort to plaintiffs in deficiency cases. In most civil cases, where the statute of limitations may be as long as three years or more, the dismissal of a case for failure to serve process within 120 days does not totally deny the plaintiff recourse, as noted by the *Kingston* court. In most deficiency cases, however, plaintiffs often do not have the luxury of so many avenues of relief noted by the court, since many of their statutes of limitation are only one year. Unlike other civil cases where the statute of limitations may exceed one year, in many deficiency cases the it is possible that the

judge will not grant a order for continuance—even with the plaintiff’s showing of good cause—and, moreover, there is usually no time to re-file the claim after dismissal.

By extending the period in which to serve the defendant to 180 days, plaintiffs in deficiency cases will enjoy a greater opportunity to achieve the justice they deserve without unduly prejudicing defendants. A 180-day period would not only give plaintiffs a greater window during which to locate and serve defendants in our increasingly transient society, but it would also reduce court load by lessening the number of extensions to be reviewed by the courts. Furthermore, even if a judge wished to grant only one motion for continuance, a plaintiff would have an entire year during which to serve the defendant.

**III. Necessity for extensions to be granted so long as the plaintiff demonstrates good cause.**

In addition to increasing the initial period of service to 180 days, we propose that judges be mandated to grant extensions so long as the plaintiff demonstrates good cause for failure to serve the defendant within the initial period. As the Mississippi Supreme Court defined “good cause” in *Holmes v. Coast Transit Authority*:

[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, the defendant has evaded service of process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances, or the plaintiff is proceeding pro se or in forma pauperis. 815 So.2d 1183, 1186 (Miss. 2002).

Several Mississippi Supreme Court cases shed further light on the requirement of “good cause.” In *Fortenberry v. Memorial Hospital at Gulfport, Inc.*, the plaintiff requested and received two grants of additional time to serve the defendant. 676 So.2d 252, 255 (Miss. 1996). When his second extension expired, the plaintiff’s counsel did not file another motion; instead,

he in essence granted himself a motion by merely writing a letter to the court stating that he would “approach the Court on the issue of process upon locating [the defendant].” *Id.* at 256. While the Court stated that the plaintiff’s counsel should have requested authority from the court for another extension, it held that the plaintiff exercised “extensive efforts to find and serve process” upon the defendant and therefore demonstrated good cause. *Id.* The Court allowed the plaintiff to continue with his efforts to locate the defendant, holding that even though the plaintiff’s counsel failed to seek a third extension from the Court, such an action was “harmless” and did not prejudice the defendant. *Id.* Although *Fortenberry* seems to be an extreme case, it clearly demonstrates that an extension granted for a plaintiff’s showing of good cause—even coupled with a glaring procedural error—does not unduly burden or prejudice the defendant.

In *Bennett v. McCaffrey*, the Mississippi Supreme Court affirmed the circuit court’s denial of the defendant’s Motion to Dismiss, which alleged that the plaintiff failed to show good cause as to why process was not served in a timely manner. 937 So.2d 11, 12 (Miss. 2006 - REHEARING DENIED SEPTEMBER 14, 2006). The Court noted the plaintiff’s efforts to serve the defendant, which included a failed attempt of personal service (defendant had moved); numerous address searches using the phone book, internet, and the Post Office; a subpoena for the defendant’s insurer to provide information about the defendant’s location; and attempts to serve the defendant by publication. *Id.* at 15. The Court held that the plaintiff demonstrated good cause for an extension of time by “diligently attempt[ing] to serve [the defendant] using all the tools at her disposal.”

That is not to say, however, that *any* effort of the plaintiff to seek out the defendant qualifies as “good cause.” In *Webster v. Webster*, for example, the Mississippi Supreme Court dismissed the plaintiff’s complaint for failure to comply with Rule 4(h). 834 So.2d 26, 29 (Miss.

2002 - REHEARING DENIED JAN 9, 2003). The Court held that the plaintiff did not demonstrate good cause when she had knowledge of the defendant's correct address from the outset of the litigation and she took only one action during the second 120-day period (issuing a subpoena to the defendant's employer). A careful application of the good cause requirement, as demonstrated by the cases above, ensures that the plaintiff may continue to pursue the defendant if and only if he or she diligently pursues the defendant, thereby protecting the defendant from prejudice and undue burden.

The attached documents from the case *Trustmark National Bank v. Holifield*, however, demonstrate the growing view contrary to the clear principles of good cause defined by the Mississippi Supreme Court. The plaintiff filed the complaint on November 20, 2006, as the attached copy indicates. On April 13, 2007, the circuit court judge granted an Order Extending Time to serve the defendant; however, he limited the period of extension to only thirty days, as opposed to the 120 days commonly granted. Before the end of the initial thirty day extension, the judge denied the plaintiff's request for additional time, thereby leaving the plaintiff less than 150 days in which to serve the defendant. As the attached plaintiff's notes from the case indicate, the plaintiff actively pursued the defendant like the plaintiff in *Bennett*, seeking to personally serve the defendant at least three times and actively searching for the defendant's whereabouts using phone books, information from local officials, power companies, the Post Office, and aid from the plaintiff's skiptracers. These detailed notes were forwarded to the circuit court judge along with the plaintiff's motion and order of continuance.

Despite these efforts, however, the circuit court judge granted only one thirty-day extension, and denied the plaintiff's second Motion of Continuance to serve the defendant, who owed over \$15,000 to the plaintiff creditor after defaulting on his payments. Therefore, due to

the defendant's evasiveness, the plaintiff was denied recourse, even after demonstrating good cause for not being able to serve the defendant. It is our opinion that such great discretion given to judges in determining good cause is unnecessary when the reasoning applied in cases such as *Bennett* and *Webster* provide clear standards of good cause (or lack thereof) that may be utilized by courts in maintaining uniformity, fairness, and judicial accountability when granting or denying motions of continuance.

#### **IV. Conclusion.**

As the Mississippi Supreme Court warned in *Holmes v. Coast Transit Authority*, the requirement for good cause "should not be used to penalize plaintiffs who demonstrate reasonable diligence in effecting timely service on defendants." 815 So.2d 1183, 1186 (Miss. 2002). However, the trend in Mississippi courtrooms indicates otherwise; cases across the state are being dismissed despite the fact that the plaintiffs are willing and able to demonstrate good cause. Clearly, the increasingly transient nature of modern society coupled with such dismissals creates an environment that encourages process evasion and irresponsibility. By increasing the initial period of service of process to 180 days and requiring judges to grant orders of continuance so long as the plaintiff demonstrates good cause, however, Mississippi courts would enable plaintiffs to pursue their claims diligently without unduly prejudicing defendants. Furthermore, defendants would not be rewarded for process evasion or the errors of third parties such as process servers.

We propose, then, that the language of Mississippi Rules of Civil Procedure Rule 4(h) be amended in the following manner:

“If a service of the summons and complaint is not made upon a defendant within 180 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 notice. If the party on whose behalf such service was required does demonstrate good cause, however, the court shall grant a continuance.”