IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00828-COA

BARBARA LEWIS, INDIVIDUALLY, AS ADMINISTRATRIX FOR THE ESTATE OF R. J. LEWIS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES FOR THE ESTATE OF R. J. LEWIS	**APPELLANT**
v.	
FOREST FAMILY PRACTICE CLINIC, P.A. AND JOHN PAUL LEE, M.D.	**APPELLEES**

DATE OF JUDGMENT:	05/23/2011
TRIAL JUDGE:	HON. VERNON R. COTTEN
COURT FROM WHICH APPEALED:	SCOTT COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES HOWARD THIGPEN
ATTORNEYS FOR APPELLEES:	MILDRED M. MORRIS TIMOTHY LEE SENSING JOHN BURLEY HOWELL III
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
TRIAL COURT DISPOSITION:	COMPLAINT DISMISSED DUE TO INSUFFICIENT SERVICE OF PROCESS
DISPOSITION:	REVERSED AND REMANDED - 01/29/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

¶1. This appeal concerns whether service of process was properly issued in a wrongful-death suit. The trial court found service of process was insufficient. We agree but find good cause existed for the failure to serve process within the proper time.

FACTS AND PROCEDURAL HISTORY

¶2. R.J. Lewis was a patient of Dr. John Paul Lee. R.J. died on March 23, 2008. On June

1, 2010, Barbara Lewis (Lewis) on behalf of R.J.'s wrongful-death beneficiaries filed suit in Scott County Circuit Court against Dr. Lee and Forest Family Practice (FFP), alleging that their acts and omissions in providing care to R.J. had caused his death. Summons were issued, and Dr. Lee and FFP were served with process. The proofs of service state that on September 21, 2010, process server Gary Windham personally served Dr. Lee with process, individually and in Dr. Lee's capacity as registered agent for FFP.

¶3. Dr. Lee and FFP subsequently filed a motion to dismiss, in which they alleged service of process was insufficient. Dr. Lee and FFP contended that process had been improperly delivered to Winnie McMullan, an office clerk at FFP. According to Dr. Lee, McMullan was not authorized to accept service of process for either Dr. Lee or FFP.

¶4. After a hearing on the matter, the trial court granted Dr. Lee and FFP's motion and dismissed Lewis's claims with prejudice. Lewis now appeals, asserting the following issues: (1) the trial court applied the incorrect legal standard; (2) service of process was sufficient; (3) public policy supports the presumption that an officer's return of process is correct; and (4) good cause exists for Lewis to be allowed additional time to serve Dr. Lee and FFP with process.

STANDARD OF REVIEW

¶5. We review de novo a trial court's decision to grant or deny a motion to dismiss. *Johnson v. Rao*, 952 So. 2d 151, 154 (¶9) (Miss. 2007). Furthermore, "the trial court, not the jury, determines issues of fact regarding service of process, and we apply an abuse-of-discretion standard to the trial court's findings of fact." *Nelson v. Baptist Mem'l Hosp.-N. Miss., Inc.*, 70 So. 3d 190, 195 (¶17) (Miss. 2011).

DISCUSSION

I. PROPER LEGAL STANDARD

II. SUFFICIENCY OF SERVICE OF PROCESS

III. PUBLIC-POLICY ARGUMENT

¶6. As the first three issues address whether the facts offered by Dr. Lee overcome the presumption that a return of process is presumed correct, we will address them together. A return of service gives rise to a presumption that service was proper; however, that presumption can be rebutted. *See McCain v. Dauzat*, 791 So. 2d 839, 842 (¶8) (Miss. 2001). According to Rule 4(d)(1)(A) of the Mississippi Rules of Civil Procedure, service of process upon an individual is accomplished "by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process." Rule 4(d)(4) states that service of process upon a corporation is accomplished "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."

¶7. Windham testified that his proof of service indicates he served Dr. Lee with process. However, Windham had no independent recollection of doing so. Windham stated that he served process on average between ten and twelve times per day. Windham's affidavit says he personally served Dr. Lee individually and as registered agent for FFP, but no one else.

¶8. McMullan testified she was working as a cashier at FFP on September 21, 2010. McMullan stated early that morning a man entered FFP, handed her some documents, and told her they were for Dr. Lee. McMullan identified the man as Windham. She replied to

Windham that she would give Dr. Lee the documents. Windham then left FFP. McMullan testified Windham did not ask to see Dr. Lee or an authorized agent for FFP nor did Windham inform her he was there to serve process on Dr. Lee or FFP. McMullan said she had not been authorized to accept service on behalf of Dr. Lee or FFP. McMullan subsequently handed the documents to the office manager. McMullan executed an affidavit stating the same. Dr. Lee testified that he did not meet Windham or receive any documents from him on September 21, 2010. Dr. Lee further stated McMullan was not authorized to accept service of process on his or FFP's behalf. Dr. Lee executed an affidavit stating the same.

¶9. Court records show that summons were issued to FFP with Dr. Lee listed as its registered agent. The record contains no evidence McMullan was an officer, a managing agent, a general agent, or a registered agent for service of process, or was otherwise authorized to receive service of process on FFP's or Dr. Lee's behalf. In a similar situation, the Mississippi Supreme Court concluded that a receptionist was not the defendant physician's agent because she was not authorized by him to accept service of process. *Johnson*, 952 So. 2d at 158 (¶18); *see also Nelson*, 70 So. 3d at 196 (¶20) (office manager was not an agent to accept process on behalf of physicians and medical clinic). The court further determined the testimony supported the following: the receptionist was unaware the papers she accepted concerned a lawsuit; she had never accepted service of process for anyone; and the process server did not ask to see the physician nor indicate he was there to serve the physician with process. *Johnson,* 952 So. 2d at 158 (¶18). Here, the trial court concluded that Dr. Lee and FFP were not properly served with process for similar reasons

as in *Johnson*. We do find evidence to support the trial court's decision in concluding that service of process was insufficient. However, we must now look to whether good cause existed for failing to properly serve Dr. Lee and FFP.

IV. EXISTENCE OF GOOD CAUSE

¶10. Lewis contends that good cause exists for additional time to serve Dr. Lee and FFP with process. Rule 4(h) of the Mississippi Rules of Civil Procedure states a party must show good cause why service of process was not made within 120 days of filing the complaint. We review a trial court's determination of whether good cause existed under our familiar abuse-of-discretion standard. *Stutts v. Miller*, 37 So. 3d 1, 3 (¶7) (Miss. 2010). Lewis failed to raise this issue in the trial court. Our "role [as] an appellate court is not to be a fact[-]finder but rather [to] determine and apply the law to the facts determined by the trier of fact." *Southern v. Miss. State Hosp.*, 853 So. 2d 1212, 1214 (¶4) (Miss. 2003).

¶11. However, in *Spurgeon v. Egger*, 989 So. 2d 901, 906 (¶18) (Miss. Ct. App. 2007), this Court found good cause existed even though the issue was not addressed by the trial court. Similarly to our facts, in *Spurgeon* the process server completed a return and swore that he had personally served the defendant physician with process, but testimony showed that he had served the office assistant and not the physician. *Id.* at 904 (¶11). As in the present case, the office assistant had no authority to accept service of process. *Id*. at (¶12). But we found several reasons the trial court should have found good cause for the plaintiff's failure to serve the physician: (1) the process server's sworn return indicating he served process on the physician; (2) no evidence was produced showing a lack of diligence on the part of the plaintiffs; (3) there were communications from the physician's attorney indicating notice was

received; and (4) the physician's involvement in bankruptcy proceedings. *Id.* at 908 (¶27). Furthermore, "good cause is likely (but not always) to be found when the plaintiff's failure to complete service in a timely fashion is a result of the conduct of a third person, typically the process server[.]" *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1186 (¶12) (Miss. 2002) (citation omitted).

¶12. In this instance, Lewis had no reason to believe that process was insufficient. Windham's notarized proof of service indicates he had served Dr. Lee individually and as FFP's registered agent. The attorney representing Lewis had used Windham on numerous occasions as a process server and never had any cause for concern. Furthermore, there were indications that notice was received by Dr. Lee and FFP. We find the trial court abused its discretion in failing to find good cause for the failure to serve Dr. Lee and FFP within 120 days. We reverse and remand for further proceedings consistent with this opinion.

¶13. **THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

IRVING, P.J., ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. GRIFFIS, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON, J.; BARNES, J., JOINS IN PART. FAIR AND JAMES, JJ., NOT PARTICIPATING.

GRIFFIS, P.J., CONCURRING IN PART AND DISSENTING IN PART:

¶14. I concur with the majority as to Issues I, II, and III. I agree that there was evidence to support the trial court's decision to conclude that service of process was not sufficient.

¶15. I dissent as to Issue IV. I am of the opinion that the trial judge did not abuse his discretion when he found good cause did not exist for the failure to serve the defendants

within 120 days. Indeed, I find that this issue has been waived because it was not presented to the trial court. Accordingly, I would affirm as to Issue IV.

¶16. Lewis's failure to argue this issue before the trial court is a procedural bar from our review here. In *Chantey Music Publishing., Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1060 (¶28) (Miss. 2005), the supreme court reasoned:

> In *Southern v. Mississippi State* [*Hospital*], 853 So. 2d 1212 (Miss. 2003), we reiterated the important procedural tenet that "a trial judge cannot be put in error on a matter not presented to him." *Id.* at 1214-15[;] *see Mills v. Nichols*, 467 So. 2d 924, 931 (Miss. 1985)[.] Precedent mandates that this Court not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the briefs. *Parker v. Miss. Game & Fish Comm'n*, 555 So. 2d 725, 730 (Miss. 1989) (citing *Britt v. State*, 520 So. 2d 1377, 1379 (Miss. 1988); *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973)). Stated clearly, "it is an elementary and familiar rule that we sit to review actions of the lower courts, and we will not undertake to consider matters which do not appear of record in the lower court, absent unusual circumstances." *Cossitt v. Federated Guar. Mut. Ins. Co.*, 541 So. 2d 436, 446 (Miss. 1989) (citing *Educ*[.] *Placement Servs. v. Wilson*, 487 So. 2d 1316, 1320 (Miss. 1986)).

¶17. This Court's failure to follow this elementary principle of appellate review in *Spurgeon v. Egger*, 989 So. 2d 901, 906 (¶18), 908 (¶27) (Miss. Ct. App. 2007), does not change the law. It only means that this Court may have erred in *Spurgeon*.

¶18. We must follow the supreme court's holding that arguments presented for the first time on appeal are waived. *Chantey Music Publ'g*, 915 So. 2d at 1060 (¶28). I am of the opinion that this issue was waived by the failure to present the issue to the trial court. For this reason, I would affirm as to Issue IV.

CARLTON, J., JOINS THIS OPINION. BARNES, J., JOINS THIS OPINION IN PART.