NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-814

	Opinion Delivered February 25, 2009
IVORY GAGE BACKUS, LORETTA GAGE HORN, IDA GAGE TAYLOR, and LEON C. GAGE APPELLANTS V.	APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT, [NO. CV-2007-58-2]
RICHARD HOWARD, AMERICAN ACADEMY OF ARTS & SCIENCES, and MASSACHUSETTS INSTITUTE OF TECHNOLOGY APPELLEES	HONORABLE JOHN N. HARKEY, JUDGE AFFIRMED

M. MICHAEL KINARD, Judge

This is an appeal from the circuit court's order dismissing appellants' case for lack of personal jurisdiction and for failure to comply with the requirements of Rule 4 of the Arkansas Rules of Civil Procedure for service of process. Appellants are four siblings, the surviving members of the Gage family, who are depicted in a 1945 photograph taken by Mike Disfarmer. This photograph, entitled "George and Ethel Gage with Mother Ida Gage and Their First Five Children: Loretta, Ida, Baby Ivory, Jesse and Leon," was the inspiration of a poem by the same name. The poem was written by appellee Professor Richard Howard of Columbia University and published, along with the photograph, in the Spring 2004 issue of the journal *Daedalus*. Appellees the American Academy of Arts & Sciences (the Academy) and

the Massachusetts Institute of Technology (MIT) publish *Daedalus* through the MIT Press. Defendant Richard Howard is a citizen and resident of New York; the Academy and MIT are both Massachusetts entities.

Appellants filed their complaint in Cleburne County Circuit Court on March 12, 2007, alleging defamation, invasion of privacy, false light, and intentional infliction of emotional distress. Specifically, they objected to being portrayed as "the children of a dysfunctional family and disturbed parents" in Howard's poem. They state in their complaint that the photograph by Disfarmer is "well-known" in their community to depict them and the rest of their family in 1945. Appellants sought compensatory and punitive damages, as well as a court order directing appellees to remove the work from availability on the Internet.

Pursuant to Ark. R. Civ. P. 4(i), a plaintiff must serve a defendant with a summons within 120 days after the filing of the complaint. In this case, appellants had until July 10, 2007, to serve appellees. On July 9, 2007, appellants timely filed a motion requesting a sixty-day extension of time in which to serve the summonses. According to both appellants and appellees, the motion was granted on July 9, 2007. However, no order granting the extension was entered within thirty days of the motion being filed.[1] According to appellants' affidavit of service of process, a summons and complaint was served on each of the following via certified mail, restricted delivery, return receipt requested: Richard Howard (signed for by a

[1] According to the circuit court and the parties, the order was entered on October 16, 2007. We find no such order in the record. The docket reflects that only two orders were entered in this case. One was the order of dismissal; the other was an "Order/Extension" entered October 16, 2007. This extension order is dated in September (not July 9) and appears to grant plaintiffs' motion for extension of time to file a response to defendants' motions to dismiss (not extend time for service of process).

Columbia University employee) on August 10, 2007; the registered agent for service of process for the Academy on August 14, 2007; the president of MIT also on August 14, 2007. On September 4, 2007, separate defendant Howard filed a motion to dismiss and accompanying brief, and on September 13, 2007, separate defendants the Academy and MIT also filed a motion to dismiss and brief. After appellants' response and appellees' replies were filed, the circuit court dismissed the case with prejudice on March 24, 2008.

The court dismissed appellants' complaint on the following grounds: under Rule 12(b)(2) for lack of personal jurisdiction; under Rule 12(b)(5) for insufficient service of process based on appellants' failure to comply with the timing requirements of Rule 4; and under Rule 12(b)(5), as to appellee-defendant Howard, for the additional reason that appellants had not served Howard with process in the manner prescribed by Rule 4. The court dismissed the case with prejudice, writing: "While dismissal under Rule 4 and Rule 12(b)(5) is ordinarily without prejudice, the Court is required to dismiss a claim with prejudice under Rule 12(b)(5) if the statute of limitations would otherwise bar a plaintiff's action." The circuit court held that appellants' failure to comply with Rule 4 meant that the applicable three-year statute of limitations, which began to accrue in the spring of 2004 with the publication of the poem, ran on their claims in 2007.

On appeal, appellants argue that the circuit court misinterpreted Rule 4(i), service of summons on defendant Howard was proper, and dismissal of their case with prejudice was error. Significantly, appellants have not argued any error as to the circuit court's dismissal for lack of personal jurisdiction. In its order of dismissal, the circuit court wrote:

> 2. AAA&S and MIT are entities based in Massachusetts. Complaint ¶ 7. Professor Howard is a citizen and resident of New York. Complaint ¶ 6. Plaintiffs purportedly seek to establish jurisdiction under the Arkansas long-arm statute, Ark. Code Ann. § 16-4-101(B), but they do not allege facts sufficient to support a finding of personal jurisdiction under the rule set out in *Howard v. County Court of Craighead County*, 278 Ark. 117, 118-9, 644 S.W.2d 256, 257 (1983). Therefore, the defendants' motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction is granted.

Because appellants do not appeal from the circuit court's holding that it lacked personal jurisdiction over appellees, this court must affirm without reaching the merits of appellants' points on appeal. *See Moore v. Mueller Industries*, 88 Ark. App. 293, 295, 198 S.W.3d 136, 138 (2004) (holding that when two alternative reasons are given for a decision and an appellant attacks only one, the appellate court must affirm).

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.