

**ARKANSAS COURT OF APPEALS**DIVISION II  
No. CA10-1202

BILLY MIKE WILSON

APPELLANT

V.

UNION PACIFIC RAILROAD  
COMPANY

APPELLEE

**Opinion Delivered** SEPTEMBER 7, 2011APPEAL FROM THE JEFFERSON  
COUNTY CIRCUIT COURT  
[NO. CV-2006-1070-1]HONORABLE ROBERT H. WYATT,  
JR., JUDGE

AFFIRMED

**ROBIN F. WYNNE, Judge**

Billy Mike Wilson appeals from the order of the Jefferson County Circuit Court granting Union Pacific Railroad's motion to dismiss his complaint in which he sought compensation for an injury under the Federal Employers' Liability Act (FELA). The complaint was dismissed because appellant failed to perfect service upon appellee within 120 days as required under Arkansas Rule of Civil Procedure 4(i). On appeal, appellant argues that (1) appellee failed to properly plead the affirmative defense of insufficiency of service of process and failed to timely bring its motion to dismiss; (2) his filings were tantamount to a motion to extend the time for service under Rule 4(i) and that motion was granted by reissuance of the summons; (3) the trial court's strict application of Rule 4(i) destroyed his federal substantive remedy under FELA; and (4) the statute of limitations on his claim should be equitably tolled during the pendency of the underlying litigation so as to preserve his rights under FELA. We affirm the decision of the circuit court.

On December 27, 2006, appellant filed a complaint in Jefferson County Circuit Court in which he alleged that he sustained injury in connection with his work for appellee. He requested that the Jefferson County Circuit Court Clerk's Office issue a summons and deliver it to the Pulaski County Sheriff's Department to be served upon appellee. Service was not obtained, and appellant made his request a second time via a letter to the Jefferson County Circuit Court Clerk's Office that was sent on April 18, 2007. Service was not obtained following the second request, and appellant requested service upon appellee directly from the Pulaski County Sheriff's Department on June 15, 2007. Service was obtained on June 25, 2007, which was 181 days after the complaint was filed. The summons erroneously states that appellee has twenty days to answer the complaint instead of the thirty days allowed for an out-of-state defendant. Appellee filed its answer on July 11, 2007. Paragraph 32 of appellee's answer states, "Pleading affirmatively, Plaintiff's Complaint should be dismissed for insufficiency of process and insufficiency of service of process."

On December 11, 2008, counsel for appellee sent a letter to counsel for appellant in which he states that appellee would not file a motion to dismiss based upon the summons containing the incorrect deadline for appellee's answer. The letter does not address the fact that appellee was served more than 120 days after the complaint was filed. On December 28, 2009, which was three years and one day after appellant's complaint was filed, appellee filed a motion to dismiss in which it argued that the complaint should be dismissed because appellee was not served with the complaint within the time prescribed by Arkansas Rule of Civil Procedure 4(i). The parties submitted briefs on the motion to the circuit court, and a hearing was held that consisted solely of arguments by counsel. On July 30, 2010, the circuit

court issued an order in which it granted appellee's motion to dismiss and dismissed the complaint with prejudice because the three-year statute of limitations applicable to claims under FELA had run. Appellant has appealed from that order.

We review a trial court's decision on a motion to dismiss for lack of compliance with Rule 4(i) under an abuse-of-discretion standard. *Wilkins v. Food Plus, Inc.*, 99 Ark. App. 64, 257 S.W.3d 107 (2007). Appellant argues that appellee failed to properly plead the affirmative defenses of insufficiency of process and insufficiency of service of process. Appellant argues that Paragraph 32 of appellee's answer violates Arkansas Rule of Civil Procedure 10(b) because it contains two separate affirmative defenses and that it also violates Arkansas Rule of Civil Procedure 8(b) because it does not state in ordinary and concise language the defenses to each claim asserted. Neither of these arguments was presented to the circuit court, and we will not consider arguments raised for the first time on appeal. *Walker v. Burton*, 2011 Ark. App. 439, \_\_\_ S.W.3d \_\_\_.

Appellant further argues that appellee's affirmative defenses were not properly pled because the answer does not reference Rule 4. As appellee notes in its brief, our supreme court has previously rejected an argument that a defendant must specify the manner in which service of process was defective. *See Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005). Appellant also argues that appellee effectively waived its affirmative defenses by participating in discovery and by virtue of the December 2008 letter from appellee's counsel to counsel for appellant. Our supreme court has held that participating in discovery does not waive a defense of insufficient service of process. *Farm Bureau Mutual Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993). In addition, the December 2008 letter does not reference

any possible defense due to untimely service and, therefore, cannot reasonably be said to constitute a waiver of any such defense. Finally, appellant argues that appellee's motion to dismiss was not timely. However, there is no applicable time limit for such a motion under Rule 4, and the rule, as it is currently worded, allows a defendant to wait until after the statute of limitations has run on a claim before bringing such a motion.

Appellant's next argument is that his filings were tantamount to a motion to extend time for service under Rule 4, and said motion was granted by the reissuance of the summons by the Jefferson County Circuit Clerk's Office. Specifically, appellant argues that his April 18, 2007 letter to the clerk's office should be treated as a motion to extend the time for service. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause. Ark. R. Civ. P. 4(i) (2011). Any such motion must be filed within 120 days of the filing of the suit. *Maguire v. Jines*, 2011 Ark. App. 359, \_\_\_ S.W.3d \_\_\_. Even allowing for the fact that there is no specified form that such a motion must take, the April 18, 2007 letter cannot be considered such a motion. Nowhere in the April 18, 2007 letter does appellant request that the time for service be extended. In addition, there is no order from the circuit court extending the time for service. This court made it clear in its decision in *Verbitski v. Union Pacific R.R. Co.*, 2011 Ark. App. 6, \_\_\_ S.W.3d \_\_\_, and its decision in *Maguire, supra*, that a written order must be entered within 120 days from the filing of the complaint in order for the time for service to be extended. Appellant failed to extend the time for service of the summons and complaint beyond 120 days.

Appellant's next argument is that the trial court's strict application of Rule 4 in this case destroyed his federal substantive remedy for his injury under FELA. The United States Supreme Court has held that, while federal substantive law governs in FELA cases, state procedural law applies. *St. Louis SW. Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). However, the Court has limited the application of state procedural rules in certain cases. In *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), the Court refused to allow what it termed "over exacting local requirements for meticulous pleadings" to result in the dismissal of a case under FELA. Appellant argues that the trial court's application of Rule 4 in this case constitutes just such an over-exacting local requirement. In support, appellant cites numerous appellate cases from other jurisdictions in which certain state procedural rules were not applied in cases involving federal law.

However, Rule 4(i) does not deal with minor procedural issues. The Arkansas Supreme Court has held that valid service of process is necessary for a trial court to acquire jurisdiction over a party. *Shotzman, supra*. The method by which the courts of a state obtain jurisdiction is a fundamental part of the state's procedural process. Furthermore, when service requirements are not met, the trial court's jurisdiction extends only to the act of ordering a dismissal of the case and nothing more. *Boyd v. Sharp County Circuit Court*, 368 Ark. 566, 247 S.W.3d 864 (2007). The circuit court's dismissal of appellant's complaint does not constitute an abuse of discretion because the circuit court had no discretion; due to appellant's failure to comply with Rule 4(i), it was required to dismiss the complaint.

Appellant's final argument is that his statute of limitations should be equitably tolled during the pendency of the underlying litigation so as to preserve his FELA rights. This court

previously considered and rejected this argument in *Verbitski, supra*. This court based its holding in *Verbitski* in part on differing facts between that case and *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959), in which the court held that the statute of limitations in FELA cases could be equitably tolled. In *Glus*, agents for the employer deceived the plaintiff by telling him he had seven years in which to file a claim when, in reality, he had only three.

Appellant attempts to distinguish this case from *Verbitski* and liken it to *Glus*, first by arguing that the conduct of appellee amounted to a misrepresentation, and, second, by stating that the plaintiff in *Verbitski* failed to obtain service. Although it is quite possible that there was a misunderstanding between the parties' counsel regarding whether appellee would seek to dismiss based upon insufficiency of service of process, appellant has not submitted evidence of a misrepresentation by appellee. Appellant's assertion that this case is distinguishable from *Verbitski* because the plaintiff in that case never obtained service is mistaken because this court's opinion clearly states that *Verbitski* *did* obtain service against the defendant, although he did so more than 120 days after his complaint was filed, as happened in this case. Also, as in *Verbitski*, appellant failed to obtain a ruling on the issue of equitable tolling from the trial court, precluding this court from review of the argument. *See Bunn Builders, Inc. v. Womack*, 2011 Ark. 231 (holding that failure to obtain a ruling at the trial court level precludes review of an issue on appeal). The order of the circuit court is affirmed.

Affirmed.

MARTIN and HOOFFMAN, JJ., agree.