

IN THE SUPREME COURT OF MISSISSIPPI

**GRACELAND CARE CENTER
OF NEW ALBANY, LLC, ADVANCED
HEALTHCARE MANAGEMENT, INC.,
KAREN CLAYTON, in her official capacity as
Administrator, SHARON WINDHAM and
W. LARRY OVERSTREET**

APPELLANTS

V.

CAUSE NO. 2015-IA-01829-SCT

**TERESA HAMLET, on behalf of
Jimmy Kinard, Deceased**

APPELLEE

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Graceland Care Center of New Albany, LLC, Appellant
2. Advanced Healthcare Management, Inc., Appellant
3. Karen Clayton, in her official capacity as Administrator, Appellant
4. Sharon Windham, Appellant
5. W. Larry Overstreet, Appellant
6. Teresa Hamlet, Appellee
7. The Estate of Jimmy Kinard, Deceased
8. Thomas L. Kirkland, Jr., attorney for Appellant
9. Andy Lowry, attorney for Appellant
10. T.K. Moffett, trial court counsel for Appellee
11. R. Shane McLaughlin, attorney for Appellee
12. Nicole H. McLaughlin, attorney for Appellee

/s/ R. Shane McLaughlin
Attorney of record for Appellee

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STATEMENT REGARDING ORAL ARGUMENT

While Appellee's counsel would welcome the opportunity to present this case orally, oral argument is not necessary in this matter. Appellants' novel argument is unsupported by any authority, either in this Court or any other.

Plaintiff sought additional time to serve process before the expiration of the original 120 day period. The Trial Court entered an Order extending the time for service, thereby tolling the limitations period. Plaintiff then timely effected service on Defendants within the extended time period and before expiration of the statute of limitations.

Appellants' argument that, despite all of this, this Court should change the law and look to when the Order granting the extension was filed by the Clerk, instead of signed by the Court, is meritless. This issue is straightforward and subject to existing precedent. Oral argument would not assist the Court in understanding the issues in this case.

STATEMENT OF THE ISSUES¹

1. Whether an Order granting an extension of time for service of process signed by the Court is effective to extend the time period at the time it is signed, or whether the Order must be filed by the Clerk before the expiration of the limitations period.
2. Whether this Court should overrule the unanimous decision in *Cross Creek Prods. v. Scafidi*, 911 So. 2d 958 (Miss. 2005).

¹ For clarity, Appellee has consolidated the issues from their presentation in Appellants' Brief. All of the issues raised by Appellants are addressed in this Brief.

STATEMENT OF ASSIGNMENT

The Supreme Court granted an interlocutory appeal in this case. Because of this, and because Appellants urge reversal of Supreme Court precedent, the case should be retained by the Supreme Court.

STATEMENT OF THE CASE

Teresa Hamlet filed a Complaint against Graceland Care Center of New Albany, LLC and others on behalf of decedent Jimmy Kinard on October 14, 2016. (C.P. p. 2)². Defendants in the action filed a Motion to Dismiss. (C.P. p. 21). The Trial Court denied the Motion to Dismiss. (C.P. p. 68).

Defendants petitioned for interlocutory appeal, which was granted by this Court.

² Clerk's Papers are cited as "C.P." and the transcript of the hearing on the Motion to Dismiss is cited as "T."

STATEMENT OF FACTS

A. Background Facts.

Jimmy Kinard (“Jimmy”) was a fifty (50) year old man with Down Syndrome. (C.P. p. 3). Jimmy was admitted to Graceland Care Center (“Graceland”), a nursing home in New Albany, Mississippi, on July 6, 2012. (C.P. p. 3) At the time of Jimmy’s admission, Jimmy’s family informed Graceland that Jimmy was prone to episodes of choking while eating. (C.P. p. 4). Jimmy’s family told Graceland that Jimmy had a tendency to eat too fast, which would sometimes result in him choking. (C.P. p. 4).

On August 18, 2012, Jimmy choked while he was eating breakfast unsupervised. (C.P. p. 4). Jimmy passed out during the episode and struck his head on a chair. (C.P. p. 4). Jimmy lay unconscious on the floor for some time until he was later found by a Graceland employee. (C.P. p. 4).

Jimmy was taken to a local hospital. (C.P. p. 4). Jimmy suffered a broken neck in the fall as a result of his loss of consciousness. (C.P. p. 4). Jimmy remained hospitalized for about a month. (C.P. p. 4-5).

Jimmy eventually returned to Graceland on September 21, 2012. (C.P. p. 4). Jimmy’s condition declined when he returned to Graceland. (C.P. 4). Two days after Jimmy’s return to Graceland, he was again transported to a local hospital. (C.P. p. 5). Jimmy died the same day, on September 23, 2012. (C.P. p. 5).

Jimmy’s family contends his death was caused by the negligence of Graceland and the affiliated Defendants. (See C.P. p. 6).

B. Facts Surrounding Service of Process.

Teresa Hamlet, Jimmy's surviving sister, retained an attorney and sent a Notice of Claim letter to Graceland pursuant to Miss. Code Ann. § 15-1-36, on July 25, 2014. (*See* C.P. p. 6-7). The certified mail was returned to Teresa's attorney as "Refused." (*See* T. p. 8; Exhibit No. 1). After the certified mail was refused, Teresa hired a private process server to personally deliver the Notice of Claim letter to Graceland and the other Defendants. (C.P. p. 55). During the process of having the Notice of Claim personally delivered, Teresa learned that Graceland had apparently "changed owners." (C.P. p. 55 n.1). On August 18, 2014, Teresa's attorney sent the Notice of Claim to the purported new owner of the facility. (C.P. p. 55 n.1). None of the Defendants ever made any response to the Notice of Claim. (*Id.*).

Teresa filed suit on behalf of Jimmy on October 17, 2014. (C.P. p 2). The 120 day period for service of process under Rule 4(h) would allow service of process, without an extension, until February 16, 2015.³

On February 13, 2015, before the expiration of the original 120 days, Teresa filed a Motion for an extension of sixty (60) days to serve Defendants. (C.P. p 17).⁴ On February 23, 2015, the assigned Circuit Judge signed an Order granting Plaintiff until April 15, 2015, to serve Defendants. (C.P. p. 18).

Graceland was served with process on April 14, 2015. (C.P. p. 45-48). For reasons unclear in the Record, the Order was not filed by the Circuit Clerk until April 14, 2015. (C.P. p. 18). Neither the Trial Judge nor Plaintiff's trial counsel know why the signed Order was not

³ Graceland contends the period would extend until February 14, 2015. (Brf. of Appellant at 3). However, because February 14, 2015, was a Saturday the time is extended until the following Monday, February 16, 2016. Miss. R. Civ. P. 6(a) (where last day of a time period is a Saturday, Sunday or holiday, and period deemed to run on the following day which is not a Saturday, Sunday or holiday).

⁴ The Motion for extension was mailed on February 12, 2015, and filed by the Clerk on February 13, 2015. (C.P. p. 17).

filed by the Clerk until April 14, 2015. (T. p. 13). The Circuit Judge explained that it was unknown whether his Chambers mailed the signed Order to Plaintiff's counsel to send to the Clerk, or whether his Chambers returned the Order directly to the Clerk for filing. (T. p. 13).

At any rate, the Order which the Circuit Judge signed on February 23, 2015, was eventually filed by the Clerk on April 14, 2015. (C.P. p. 18). It is solely because of this delay of the Order being filed by the Circuit Clerk that Defendant claims it is entitled to dismissal. (C.P. p. 21).

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Clark v. Knesal*, 113 So. 3d 531, 539 (Miss. 2013). The issues of law in this appeal are subject to *de novo* review.

A Trial Court has broad discretion to grant an extension of time before the expiration of the original time period has expired. Miss. R. Civ. P. 6(b). A Trial Court's grant of such a discretionary extension is reviewed for abuse of discretion. *Cross Creek Prods. v. Scafidi*, 911 So. 2d 958, 960 (Miss. 2005); Miss. R. Civ. P. 6(b)(1).

SUMMARY OF THE ARGUMENTS

The Trial Court correctly denied the Motion to Dismiss in this case. Under established Mississippi law, the statute of limitations stops running on the date the Complaint is filed, so long as process is ultimately timely served. It is undisputed in this case that Plaintiff timely served Defendant within an extension granted by the Trial Court.

There is no authority to support Graceland's novel argument that the statute of limitations expired on the claim notwithstanding the Court's signed Order granting the extension to serve process, merely because the Order was not filed with the Clerk until a few weeks later. The Court's Order was effective to grant the extension regardless of when it was filed. The filing of an Order by a Clerk is a mere ministerial act. It is the Court's judicial act which grants an extension, not the Clerk's ministerial act. A Court Order granting an extension of time cannot lose its effectiveness because of a delay in the filing of the Order by the Circuit Clerk.

Under the plain language of Rule 4(h) and Rule 6(b)(1), as well as this Court's prior rulings, a party does not have to show good cause for an extension to serve process so long as the motion for an extension is filed within the original 120 days. Plaintiff in this case filed the motion within the original 120 days. As such, under Rule 6(b)(1), the Trial Court had discretion to grant the extension, without notice. The Trial Court did not abuse its discretion in this regard.

Because existing law so opposes Graceland's position in this case, Graceland urges this Court to reverse a decade of precedent beginning with the Court's decision in *Cross Creek Prods v. Scafidi*. *Scafidi* and its progeny were correctly decided. *Scafidi* has been cited with approval and applied by this Court, the Court of Appeals and a federal court applying Mississippi law. *Scafidi* properly construed Rules 4(h) and 6(b)(1). There is no basis to revamp the way service of process works in Mississippi by overruling the *Scafidi* line of cases.

ARGUMENT

A. A COURT'S ORDER GRANTS AN EXTENSION OF TIME, NOT THE FILING BY THE CLERK.

1. Framework for Timely Service of Process.

A plaintiff has 120 days from the filing of a Complaint to serve defendants with process.

MISS. R. CIV. P. 4(h). Rule 4(h) provides as follows:

If a service of the summons and complaint is not made upon a defendant within 120 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 motion.

Id.

Where process is eventually timely served, the filing of the complaint tolls the statute of limitations until a suit's dismissal. *Canadian Nat'l/Ill. Cent. R.R. v. Smith*, 926 So. 2d 839, 845 (Miss. 2006) (citing *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348, 352 (Miss. 1986)). The date a plaintiff files the Complaint is the relevant date for statute of limitation purposes, taking into consideration extensions of time to serve process. *Crumpton v. Hegwood*, 740 So. 2d 292, 294 (Miss. 1999).

Applying the straightforward language of Rule 4(h), this Court has previously held that Rule 4(h) does not require good cause to be shown for an extension to serve process when the request for the extension is filed within the 120 day period. *Cross Creek Prods. v. Scafidi*, 911 So. 2d 958, 960 (Miss. 2005). Justice Waller announced the unanimous holding in *Scafidi* as follows:

Rule 4(h) clearly does not apply to a motion for additional time filed within the initial 120 days. In fact, under Rule 4(h), a showing of good cause is not required unless and until the complaint is subject to dismissal for failure to serve process within 120 days, and a complaint cannot be subject to dismissal for failure to serve process within 120 days until the 120-day period has elapsed. There is no

requirement in the Rules that, during the initial 120-day period, a plaintiff must show good cause in order to obtain additional time in which to serve process.

Scafidi, 911 So. 2d at 960.

Under Rule 6(b), the Trial Court has discretion to grant an extension of time prior to the expiration of the original time period. Rule 6(b) provides:

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion for notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed

Miss. R. Civ. P. 6(b)(1).

Rule 6 cause is different from the heightened standard required for requests made *after* expiration of the original period. *Scafidi*, 911 So. 2d at 960. Where the request is made within the original time period, an extension “normally will be granted in the absence of bad faith or prejudice to the adverse party.” *Id.* quoting 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 1165, at 522 (3d ed. 2002). The Trial Court’s grant of an extension under Rule 6(b), within the original time period proscribed, is reviewed for abuse of discretion. *Scafidi*, 911 So. 2d at 960.

The Trial Court in this case did exactly what is provided for under Rule 4(h), Rule 6(b)(1) and *Scafidi*. Plaintiff timely sought an extension of time *before* the expiration of the 120 day period. The Court exercised its discretion under Rule 6(b)(1) and allowed Plaintiff a sixty (60) day extension. Plaintiff timely effected service of process within the extended time period.

Graceland does not contend that Plaintiff sought the extension to serve process in bad faith. Graceland does not contend that it will suffer prejudice as a result of the extension. Graceland ostensibly does not contend that the Trial Court abused its discretion in allowing the extension.

Existing law gives Graceland nothing to argue about in this case. Because no arguments are available under existing law, Graceland fashions a new one. As explained below, Graceland argues that even though the Circuit Judge signed the Order granting the extension it was permanently ineffective because it was not filed with the Clerk until April 14, 2015. Defendant argues that in order to be effective, the Trial Judge's Order must have been filed by the Clerk prior to March 22, 2015, when the statute of limitations would have run (but for the Order). Defendant suggests that the Order (somehow) became a legal nullity, and the Circuit Court's extension should be disregarded.

As explained below, Graceland is incorrect. The statute of limitations stopped running in this case on the day the Complaint was filed – October 17, 2014. Because Plaintiff obtained an extension to serve process within the original 120 day period, and timely served process on Defendants within that extension, the limitations period is deemed to have stopped running on the date the Complaint was filed.

2. The Trial Court Order Extends Time, Not the Filing by the Clerk.

It is undisputed in this case that Plaintiff, adhering to *Scafidi*, filed a motion for an extension of time to serve process prior to the expiration of the original 120 day period. It is undisputed that the Trial Court, exercising its discretion under Rule 6(b)(1) granted the extension. It is undisputed that Plaintiff then effected service of process within the extended time period. The Trial Court's Order, signed on February 23, 2015, before the statute of limitations could have arguably expired, provides as follows:

CAME ON THIS CAUSE for hearing on this date on *Motion to Extend Time to Serve Process* filed by the Plaintiff in this cause, and the Court, having considered same, is of the opinion that the Motion should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff is hereby granted sixty (60) days from February 14, 2015, to serve process on Defendants in this cause.

SO ORDERED on this the 23rd day of February, 2015.

/s/ Kelly Luther
Circuit Judge

(C.P. p. 18). Plaintiff timely effected service of process within the sixty (60) day extension.

(C.P. p. 45-48).

While these undisputed facts should end this issue, Defendant makes the creative argument that even though the Trial Court extended the time for service of process by Order before the expiration of the statute of limitations, the Order was not “effective” to toll the limitations period until it was filed by the Circuit Clerk. Thus, so the argument goes, because the Order was not filed by the Clerk until after the statute of limitations would have expired (had the Order not been entered), the statute was never tolled and the Trial Court’s Order granting an extension was a nullity.

This is an intensely creative argument. However, for good reason, it is not the law in the State of Mississippi or in any other jurisdiction.

A Court’s Order is the “act of the Court.” *Banks v. Banks*, 511 So. 2d 933, 935 (Miss. 1987). The filing of an Order by the Clerk of the Court is simply the ministerial notation of the Order on the Court’s docket. *Banks*, 511 So. 2d at 935.

A Trial Court’s ruling is effective when it is made by the Court, not when it is filed by the Clerk. *See White v. Miss. Dep’t of Human Servs.*, 39 So. 3d 986, 988 (Miss. Ct. App. 2010). Even a Trial Court’s oral ruling is effective on the date it is made, not the date when a

subsequent written Order is signed. *White*, 39 So. 2d at 988. In *White*, a Chancellor rendered an oral bench opinion on February 19, 2008, increasing child support. *Id.* at 987. A written Order on the opinion was not signed until about two (2) months later on April 14, 2008. *Id.* The Appellant claimed that the Court's Order could not take effect until the Chancellor "signed the Order." *Id.* The Court of Appeals disagreed and found that the Chancellor did not err by finding that child support was increased as of the date of the bench opinion. *Id.*

No authority stands for the proposition that an Order is a legal nullity until it is filed by the Clerk, or that once it is filed it has only prospective effect. No authority stands for the novel argument that an Order can lose its effectiveness to grant an extension because of a delay in docketing the Order by the Clerk.

It is the Court, not the Clerk, which acts with the force of law. To be sure, there are instances where entry by the Clerk is necessary to trigger a time period. For instance, the time for taking an appeal to this Court does not begin until an Order is docketed. *See Miss. R. App. P. 4(a); Sweet v. Luster*, 492 So. 2d 983, 984 (Miss. 1986). However, the finality of a judgment for purposes of an appeal is not analogous to this case. While the time to appeal begins to run when a Final Judgment is filed, no one would contend that the Judgment is ineffective when not filed for several weeks, or even months. No one would argue, as Graceland does in this case, that a Final Judgment loses its effect when not filed with the Clerk for a few weeks. Rather, whenever the Court's judgment is docketed by the Clerk the time for post-trial motions, or appeal, begins to run but the Judgment was effective from the time it was rendered by the Court. Neither a Final Judgment, nor the interlocutory Order in this case, can lose its power simply by a delay in docketing by the Court Clerk.

The failure of an Order to be entered by the Clerk of the Court is a mere “clerical oversight.” *Sweet*, 492 So. 2d at 984. In *Sweet*, for instance, the Trial Court’s Final Judgment was not docketed by the Clerk. The Appellee claimed that the appeal was untimely. *Id.* The Supreme Court denied a motion to dismiss the appeal. *Id.* at 985. The Supreme Court gave instructions for the Clerk to correct the “clerical oversight” by entering the Judgment, and ruled that the appeal would then continue in the ordinary course. *Id.*

The timeliness of a Clerk’s ministerial act of filing a Court Order may trigger the running of time periods under the Rules, but it does not govern the effectiveness of the Court’s Orders. To hold otherwise would elevate the Clerk’s ministerial act of filing above the Trial Court’s judicial acts. To hold that an Order can lose its efficacy by being entered by the Clerk after a time period expired would subvert the judicial process, and deprive the Trial Courts of the ability to control their docket.

This case does not present an issue of first impression in the classic sense of that phrase. While this Court has not been confronted with this precise argument, the resolution of this issue is established by existing authority.

It is the Circuit Court which has the authority to grant, or deny, an extension under Rule 4(h) and 6(b). The Court speaks through its Order. The Court granted the extension on a timely filed Motion, before the expiration of the limitations period. The Clerk’s failure to file the Court’s Order for weeks, or even years, would have no effect on the effectiveness of the Order.

To accept Graceland’s argument that the statute of limitations expired on March 22, 2015, after the Order was signed but before it was filed, would require this Court holding that the Order was a legal nullity until filed by the Clerk, and that the Order was powerless to grant an

extension unless filed by the Clerk before the running of the time period. Again here, no authority supports these illogical contentions.

In its Brief, Graceland characterizes the Order extending the time for service of process as a “private Order” which deprived the Parties of Notice. Graceland asserts:

But whether a plaintiff fails to meet her duty to get an order timely signed and filed, or whether a trial court inadvertently signs an order and does not forward it to the clerk or the parties, an order that is merely signed but kept private cannot have legal effect.

Otherwise, for instance, a party could obtain a signed order, keep it to herself, and then file a motion for contempt of court upon the opposing party for failure to obey the secret order. That cannot be how our legal system works.

(Appellants’ Brief at 11-12).

This argument is a red herring and this case is easily distinguishable from such hyperbole. As of the date of the Order extending the time for service in this case, none of the Defendants had entered an appearance. None of the Defendants were entitled to notice. *See* Miss. R. Civ. P. 5(a) (service required on parties who have appeared). Further, under Rule 6(b)(1), the Trial Court can grant such extensions of time “without motion or notice.” Miss. R. Civ. P. 6(b)(1). Because a defendant has, by definition, not been served with process when a plaintiff is seeking an extension of time in which to effect service, defendant is not entitled to any notice whatsoever. *Nelson v. Baptist Mem. Hosp. - N. Miss., Inc.*, 972 So. 2d 667, 671 (Miss. Ct. App. 2007).

Graceland argues for a dramatic change in settled Mississippi law in this case. If the Court changed Mississippi law to suit Graceland’s ends in this case, a host of unintended consequences would follow. Delays in the filing of an Order would cause both plaintiffs and defendants to lose their rights to the Courthouse in innumerable circumstances. For instance, consider a scenario in which the statute of limitations period was within a day from expiring

when suit was filed. In this circumstance, if a Judge extended the time for service of process within the original 120 day period, but mailed the Order to the Clerk or counsel of record, the limitations period would expire while the Order was in the mail. By the time the Clerk filed the Order, a day or so later, the statute of limitations would have expired and the Order signed by the Circuit Judge would be ineffective to grant the extension which the Judge intended. The Circuit Judge's intent to extend the time period would be thwarted unless the Order was filed by the Clerk on the same day it was entered.

Similarly, if Graceland's argument were accepted, there would be no reason it would not apply to other matters of time calculation under the Rules. For instance, Requests for Admission are deemed admitted by operation of law if not responded to within thirty (30) days. MISS. R. CIV. P. 36. Under Graceland's argument, if a defendant needed time to answer Requests for Admission, the defendant must ensure not only that it filed a motion for extension within the thirty (30) day period for responses, but also that the Judge signed the Order and it was filed by the Clerk within the time period. Under Graceland's argument, where the Motion is timely filed and an Order is signed, but the Order is filed by the Clerk outside the original time for responses to the Requests for Admission, the Requests for Admission would be deemed admitted despite the Court's Order.

Graceland's illogical argument could be extended as far as a lawyer's imagination would allow. Perhaps a creative attorney could argue that a Trial Court's oral ruling on a Motion *in Limine* was ineffectual until a written Order was filed by the Clerk, thus excluded evidence could be freely admitted at trial until such time. The scenarios under which Graceland's advocated rule would be unworkable are limitless. Graceland's arguments would impose on the Trial Court

Judges to see that their Orders were filed immediately with the Clerks across the judicial district, under pain of the Orders losing the power of the Court by a delay in docketing.

This is not the law in Mississippi, or anywhere else. Orders granting an extension of time are effective to extend the time period when they are granted by the Court, not when they are filed by a Clerk. Mississippi law provides that plaintiff must either serve defendant within 120 days or seek an extension within that time period to avoid the heightened good cause standard. Graceland asks the Court to expand a plaintiff's obligation to ensure that the Judge signs the Order and that it is filed with the Clerk before it has effect. This is inconsistent with established precedent, the Rules of Civil Procedure and logic.

Rule 1 of the Mississippi Rules of Civil Procedure provides that “[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action.” MISS. R. CIV. P. 1. Graceland's argument is the antithesis to this stated purpose of the Rules. Graceland asks the Court to misconstrue the Rules to require a party not only to timely seek and obtain an extension, but to further see that the Clerk of the Trial Court timely docket the Order, under penalty of dismissal of the action.

Graceland argues for this Court to ignore entirely Rule 1, and to re-write Rules 4(h) and 6(b)(1), while also overruling *Scafidi*. The Court should decline this invitation to so fundamentally alter Mississippi civil practice. The Trial Court's denial of the Motion to Dismiss should be affirmed.

B. THE COURT SHOULD NOT OVERRULE *CROSS CREEK PRODS. V. SCAFIDI*

In *Scafidi* this Court held that Rule 4(h), by its own terms, does not require a showing of good cause for an extension of the time to serve process, so long as the Motion for the extension is filed within the original 120 days. *Scafidi*, 911 So. 2d at 960. The Court ruled that such an extension may be granted in the trial court’s discretion under Rule 6(b)(1). *Id.*

Chief Justice Waller, writing for the unanimous Court, explained as follows:

Cross Creek argues, however, that Scafidi’s motion for additional time in which to serve process should have been denied because she failed to show good cause for failing to serve process within 120 days. Rule 4(h) clearly does not apply to a motion for additional time filed within the initial 120 days. In fact, under Rule 4(h), a showing of good cause is not required unless and until the complaint is subject to dismissal for failure to serve process within 120 days, and a complaint cannot be subject to dismissal for failure to serve process within 120 days until the 120-day period has elapsed. There is no requirement in the Rules that, during the initial 120-day period, a plaintiff must show good cause in order to obtain additional time in which to serve process.

Cross Creek cites *Bang v. Pittman*, 749 So.2d 47, 52 (Miss. 1999), in support of its argument that the complaint should have been dismissed, and, indeed, *Bang* holds that a plaintiff must show good cause for additional time in which to serve when the motion for additional time is filed within the initial 120-day period. We overrule *Bang* to the extent that it states that good cause is required for such a motion because it cannot be reconciled with the Mississippi Rules of Civil Procedure.

Id. *Scafidi* thus expressly overruled *Bang v. Pittman*, 749 So.2d 47, 52 (Miss. 1999). Now, about a decade after *Scafidi*, Graceland asks the Court to reverse course, overrule *Scafidi* and reinstate *Bang*.

Scafidi was correct when it was decided in 2005, and it is correct today. Rule 4(h) and Rule 6(b)(1) clearly do not require “good cause” to extend the time to serve process before expiration of the original 120 day period. As the Trial Court did in this case, Courts have discretion to allow an extension if the request is made within the original time period. *See* MISS. R. CIV. P. 6(b)(1). *Scafidi* is sound law.

Cases since *Scafidi* have uniformly relied on the opinion and applied its reasoning. *See, e.g., Johnson v. Thomas*, 982 So. 2d 405, 413 (Miss. 2008) (citing *Scafidi* and noting that “[w]hile we recognize that Rule 6(b)(1) provides for an enlargement of time “for cause shown,” when reading the two Rules together, it is apparent that Rule 4(h) requires “good cause” after the expiration of 120 days); *Nelson v. Baptist Mem. Hosp. - N. Miss., Inc.*, 972 So. 2d 667, 671 (Miss. Ct. App. 2007) (applying *Scafidi* and noting a Court may grant an extension before the original 120 days applies without notice or motion); *Leggett v. Graybar Elec. Co.*, No. 3:14-CV-364-CWR-FKB (S.D. Miss. April 13, 2015) (applying *Scafidi* to deny Motion to Dismiss in federal district court).

This Court recognizes the principle of *stare decisis*. *See, e.g., Ground Control, LLC v. Capsco Indus.*, 120 So. 3d 365, 376 (Miss. 2013). Indeed, the principle of *stare decisis* has “special force” when the prior decision has been relied upon and overruling the decision would “dislodge settled rights.” *Capsco Indus.*, 120 So. 3d at 376.

This Court, the Court of Appeals and the Mississippi federal district courts have relied on the *Scafidi* decision. Attorneys representing parties throughout Mississippi routinely rely on *Scafidi*. After *Scafidi*, the bench and bar were clearly instructed when a showing of good cause was required for an extension and when it was not.

There is no analytical reason to revisit *Scafidi*. *Scafidi* properly construed Rule 4(h) and Rule 6(b)(1). *Scafidi* was right. Graceland’s request that *Scafidi* be overruled, to suit its ends in this case, is meritless.

CONCLUSION

The Trial Court correctly denied Graceland's Motion to Dismiss. The claim is not barred by the statute of limitations because process was timely served within an extension allowed by the Trial Court. The Trial Court properly extended the time for service of process without a showing of good cause, because the motion for an extension was filed within the original 120 days.

There is no merit to Graceland's arguments. The Trial Court's decision should be affirmed.

RESPECTFULLY SUBMITTED, this the 28th day of October, 2016.

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of the Brief of Appellant to all counsel of record and the Trial Court Judge by the MEC system or by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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This the 28th day of October, 2016.

/s/ R. Shane McLaughlin