

**ARKANSAS COURT OF APPEALS**

DIVISION I

No. CA09-539

JANNA D. McCOY

APPELLANT

V.

WAYNE DALE BODIFORD

APPELLEE

**Opinion Delivered** February 17, 2010

APPEAL FROM THE PERRY  
COUNTY CIRCUIT COURT  
[NO. CIV-07-39]

HONORABLE MARY SPENCER  
McGOWAN, JUDGE

AFFIRMED

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**JOSEPHINE LINKER HART, Judge**

The circuit court dismissed the complaint of appellee, Wayne Dale Bodiford, without prejudice. Appellant, Janna D. McCoy, argues on appeal that because Bodiford's method of service of the complaint and summons by mail did not comport with Rule 4 of the Arkansas Rules of Civil Procedure, there was no complete service. Thus, McCoy asserts, the dismissal should have been with prejudice, as Bodiford no longer could avail himself of the saving statute to refile the complaint. Because the issue is one of law, our review is *de novo*. *Clouse v. Tu*, 101 Ark. App. 260, 274 S.W.3d 344 (2008). We conclude that Bodiford completed timely but defective service of his complaint and summons, and thus Bodiford could have his case dismissed without prejudice and avail himself of the saving statute and refile his case.

According to appellee's complaint, on August 1, 2005, McCoy pulled in front of Bodiford's vehicle, causing the cars to collide. Bodiford filed the complaint on May 24, 2007,



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asserting that McCoy was negligent and that Bodiford was entitled to recovery of damages. A summons was issued the same day.

According to the documents in the record, McCoy died in March 2007. On June 27, 2007, Bodiford filed a petition to appoint a special administrator of the estate of McCoy for the purpose of accepting service. An order to that effect was filed September 14, 2007. On September 15, 2007, Bodiford mailed the summons and complaint to the special administrator by first-class mail. On October 5, 2007, McCoy answered and further asserted that the complaint should be dismissed because of insufficiency of service of process.

On September 30, 2008, McCoy's attorney sought dismissal of the complaint, alleging that the time to perfect service, 120 days from May 24, 2007, had expired on September 21, 2007, and that Bodiford had failed to perfect service. Further, McCoy's attorney alleged that the statute of limitations had expired on August 1, 2008, and because Bodiford had failed to perfect service, the case had to be dismissed with prejudice.

In reply, Bodiford asserted that he had served McCoy by first-class mail on September 15, 2007, by virtue of his mailing the summons and complaint to the special administrator. Bodiford admitted that because the summons and complaint were not mailed with a return receipt requested and delivery restricted to the addressee as required by Rule 4(d)(8)(A)(i) of the Arkansas Rules of Civil Procedure, his service was "defective." He contended, however, that because he filed his complaint during the limitations period and served it timely, albeit imperfectly, he was entitled to the one-year grace period provided by the saving statute, *see*



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Ark. Code Ann. § 16-56-126(a)(1) (Repl. 2005), and therefore the case should be dismissed without prejudice.

The circuit court dismissed the case without prejudice. The circuit court noted that Bodiford acted within the allocated time for service but imperfectly served the special administrator by using regular mail. Relying on *Clouse v. Tu*, 101 Ark. App. 260, 274 S.W.3d 344 (2008), the circuit court observed that when a plaintiff files his case during the limitations period and serves it timely but imperfectly under Rule 4, if the limitations period has expired he is entitled to the grace period provided by the saving statute to refile the case.

On appeal, McCoy raises the same argument for dismissal with prejudice. We, however, affirm the circuit court. As noted by the circuit court, *Clouse* controls our decision. In *Clouse*, personal service was defective in that it did not satisfy the requirements of Rule 4(d)(1) of the Arkansas Rules of Civil Procedure, because service was on the defendant's wife at the defendant's office and not at the defendant's residence or on his registered agent for service. The *Clouse* court acknowledged that if there is no service, then an action is not commenced and the statute of limitations continues to run; after the expiration of the statute, a dismissal is with prejudice. *Clouse*, 101 Ark. App. at 263, 274 S.W.3d at 346. The court, however, concluded that "when the plaintiff completes timely service of the summons and complaint, he commences his case even if time reveals that the service was defective in some particular." *Clouse*, 101 Ark. App. at 266, 274 S.W.3d at 348. Thus, "[w]hen a plaintiff files his case during the limitations period, and serves it promptly but imperfectly under Rule 4,



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if the limitations period has expired then he deserves the grace period provided by our saving statute to refile his case and serve it properly.” *Clouse*, 101 Ark. App. at 266–67, 274 S.W.3d at 348.

As in *Clouse*, Bodiford’s service of process did not comport with Rule 4. But again as in *Clouse*, because Bodiford filed his case during the limitations period and served it promptly but imperfectly under Rule 4, he deserved the grace period provided by the saving statute to refile his case and serve it properly. McCoy attempts to distinguish between the imperfect service in *Clouse* and the type of imperfect service here. McCoy asserts that in *Clouse* service was proper when the summons and complaint left the plaintiff’s control and the defect was in the completion of personal service, whereas here service was not executed properly because the plaintiff, Bodiford, did not comply with the mailing requirements. We see no meaningful distinction. Both in *Clouse* and in the case at bar there was imperfect service rather than no service. To reach a different result would thwart “the beneficent purpose of our saving statute,” *Clouse*, 101 Ark. App. at 267, 274 S.W.3d at 348, for no obvious reason.

Affirmed.

GLADWIN and BROWN, JJ., agree.

*Laser Law Firm*, by: *Andy L. Turner* and *Amanda J. Andrews*, for appellant.

*Brazil, Adlong, Winningham & Mickel, PLC*, by: *William Clay Brazil*, for appellee.