

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

No. 24126

CHARLES E. PLUM and LINDA PLUM,
Plaintiffs Below, Appellants

v.

**CAMDEN-CLARK FOUNDATION, INC.,
d/b/a CAMDEN-CLARK MEMORIAL HOSPITAL,
MICHAEL SANTER, JR., and M. DAVID AVINGTON,
Defendants Below, Appellees.**

**Appeal from the Circuit Court of Wood County
Honorable George W. Hill, Judge
Civil Action No. 96-C-13**

REVERSED

**Submitted: September 10, 1997
Filed: August 2, 2023**

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The opinion of the Court was delivered PER CURIAM.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va.770, 461 S.E.2d 516 (1995).

2. “Dismissal under Rule 4(1) of the West Virginia Rules of Civil Procedure is mandatory in a case in which good cause for the lack of service is not shown, and a plaintiff whose case is subject to dismissal for noncompliance with Rule 4(1) has two options to avoid the consequence of the dismissal: (1) To timely show good cause for not having effected service of the summons and complaint, or (2) to refile the action before any time defenses arise and timely effect service under the new complaint.” Syl. Pt. 3, *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman*, 197 W.Va. 282, 475 S.E.2d 374 (1996).

Per Curiam:¹

This is an appeal by Charles E. Plum and Linda Plum, appellants/plaintiffs, from an order of the Circuit Court of Wood County dismissing their complaint for failing to timely effect service of process. The sole issue presented is whether the circuit court committed error in finding the plaintiffs' did not establish good cause in failing to timely effect service of process.

I.

On January 11, 1996 the plaintiffs filed a medical malpractice action against Camden-Clark Foundation, Inc. (d/b/a Camden-Clark Memorial Hospital), Michael Santer, Jr., and M. David Avington, appellees/defendants. Service of process on the defendants was not made until 181 days after the

¹We point out that a per curiam opinion is not legal precedent. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4. (1992) ("Per curiam opinions ... are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta.... Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published per curiam opinions. However, if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion.").

complaint was filed. The defendants moved to dismiss the complaint on the grounds that they were not served with process within the 180 day requirement of Rule 4(1) of the West Virginia Rules of Civil Procedure. The circuit court granted each of the defendants' motion to dismiss. On appeal the plaintiffs contend they established good cause for serving process one day late.

II.

The standard of review applicable here is set out in Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). This Court addressed dismissal of a complaint for failure to timely effect service of process in *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman*, 197 W.Va. 282, 475 S.E.2d 374 (1996). In view of *Kaufman's* "good cause" test and the facts developed below in this case,² we find it was error for the circuit court to dismiss the plaintiffs'

²Service of process could have occurred within the 180 day period, except for the refusal of the circuit court clerk's office to accept a properly completed facsimile copy of a previously submitted incomplete Civil Information Sheet on the 180th day. At the time of this incident the West Virginia Rules of Civil Procedure did not address the issue of facsimiles. Silence by the Rules of Civil Procedure did not give the clerk's office authority to refuse the proffered and properly completed facsimile. The action of the clerk's office in refusing to accept the facsimile amounted to an amendment to the Rules of Civil Procedure. No circuit court clerk's office in the State of West Virginia has authority to amend the Rules of Civil Procedure. It is the exclusive constitutional domain of this Court to amend the Rules of Civil Procedure. We note that this

complaint.

Reversed.