

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 30, 2010 Session

ROBERT G. CRABTREE, JR., ET AL. v. JENNIFER L. LUND

**Appeal from the Circuit Court for Carter County
No. C10184 Thomas J. Seeley, Judge**

No. E2009-01561-COA-R3-CV - FILED OCTOBER 28, 2010

D. MICHAEL SWINEY, JUDGE, concurring.

I concur in the decision to vacate the judgment of the Trial Court. I agree that Tenn. R. Civ. P. 4.01(3) controls the outcome of this appeal. I further agree that the issue in this case is whether Plaintiffs intentionally caused the delay in the prompt service of the summons. I further agree that the record before us shows that Plaintiffs did make at least some attempts to serve Defendant. This being so, I agree that Defendant did not meet her burden of showing that Plaintiffs intentionally delayed service of the summons.

I write separately to express my concern that the Opinion in the future may be used to argue the position that Rule 4.01(3) requires not only that a plaintiff intentionally have delayed prompt issuance or service of the summons, but also that this intentional delay was because of some actual or at least “perceived advantage to the plaintiff in delaying service.” I do not think Rule 4.01(3) concerns itself with why a plaintiff intentionally delayed the issuance or service of a summons, only with whether the delay was intentional. Proof that there was some actual or “perceived advantage to the plaintiff in delaying service” might well be evidence that the delay was intentional, but the existence of such an actual or “perceived advantage to the plaintiff” is not, I believe, a requirement of Rule 4.01(3). The only question under Rule 4.01(3) is whether the delay was intentionally caused by plaintiff or plaintiff’s counsel.

D. MICHAEL SWINEY, JUDGE