

IN THE SUPREME COURT OF MISSISSIPPI

J. W. CLAYTON, JR.

APPELLANT

VERSUS

CASE NO.: 2006-CA-01694

JEFFREY HARTSOG

APPELLEE

REPLY BRIEF OF THE APPELLANT

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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.

J. W. Clayton, Jr., Appellant

Jeffrey Hartsog Appellee

Honorable Winston Kidd, Circuit Court Judge of Hinds County

Honorable William R. Barnett, County Court Judge of Hinds County



Attorney of Record for Appellant

TABLE OF CONTENTS

PAGES

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
LIST OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	iv
STATEMENT OF THE CASE	1-3
SUMMARY OF THE ARGUMENT	3
Standard of Review	4
The Facts	4-5
ARGUMENT AND THE LAW	5-9
Hartsog does not dispute that Clayton did not receive the trial court's Order	5-6
Appellant Clayton met his burden of proof to receive additional time for appeal.	6-7
Clayton did not receive notice of Order until after his time for appeal had run	7-9
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Authority	Page(s)
<u>Cooper v. State Farm Fire & Cas. Co.</u> 568 So.2d 687, 692 (Miss. 1990)	7-8
<u>Nunley v. City of Los Angeles</u> 52 F.3d 792, 798 (9 th Cir. 1995)	6, 7
<u>Palmer v. Biloxi Regional Medical Center</u> 564 So.2d 1346 (Miss. 1990)	4
<u>Pierce v. Heritage Properties, Inc.</u> 688 So.2d 1385 (Miss. 1997)	4
Miss. R. App. P. 4(h)	5, 6, 7, 8

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ABUSED HIS DISCRETION BY NOT GRANTING APPELLANT ADDITIONAL TIME TO APPEAL THE CIRCUIT COURT'S RULING OF DISMISSAL TO WHICH APPELLANT RECEIVED NO NOTICE.

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COMES NOW THE APPELLANT, J. W. Clayton, Jr. (hereinafter “Appellant” or “Clayton”), and files this his Appellant’s Reply Brief, and would respectfully show unto the Court the following, to-wit:

STATEMENT OF THE CASE

Pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure, Appellant submits his Statement of the Case.

On or about April 20, 2004 Clayton filed a Complaint for slander and intentional infliction of emotional distress against the Appellee, Jeffery Hartsog (hereinafter “Appellee” or “Hartsog”), in the County Court First Judicial District of Hinds County, Mississippi. On or about August 17, 2005, Hartsog filed a Motion for Summary Judgment or in the Alternative Motion to Dismiss. Clayton responded to Hartsog’s Motion and promptly filed a Motion to Compel Discovery Responses and a Motion for Leave to Amend Complaint.

On October 6, 2005, counsel for the parties had oral arguments before Honorable William Barnett on Hartsog’s Motion for Summary Judgment or in the Alternative Motion to Dismiss, and Clayton’s Motion to Compel Discovery Responses and Motion for Leave to Amend Complaint.

Hartsog claimed doctor-patient privilege and that he did not keep business records that would reflect the dates and names of his patients. Honorable William Barnett denied Clayton's Motion to Compel and Motion to Amend and granted Hartsog's Motion for Summary Judgment.

Subsequently, on or about November 4, 2006 Clayton timely appealed Judge Barnett's ruling to the Circuit Court of Hinds County. Honorable Tomie T. Green was assigned to the case. The appellant and appellee timely filed their briefs and then Judge Green recused herself and the case was reassigned to Honorable Winston Kidd on or about March 14, 2006. Judge Kidd affirmed Judge Barnette's ruling by way of his Memorandum Opinion and Order dated June 9, 2006 (Appellant's R.E. 1); however, said Memorandum Opinion and Order was never received or mailed to appellant or appellant's counsel. Appellee's counsel sent a letter dated July 13, 2006 (Appellant's R.E. 2) which indicated for the first time that an adverse ruling had been handed down by Judge Kidd. Counsel's letter was the first notice and any form received by appellant or appellant's counsel.

Clayton immediately filed his motion to reopen time for appeal (Appellant's R.E. 3), upon receiving notice from opposing counsel, in a brief stating that appellant had not received Judge Kidd's Memorandum Opinion and Order. Upon further investigation at the Circuit Clerk's office, appellant's counsel became aware that the only attorney listed with the Hinds County Circuit Court for either party was Robert J. Arnold, III (Appellant's R.E. 4). Not only was Mr. Arnold the only attorney listed of record, but he was listed as the attorney for the plaintiff J. W. Clayton, Jr., in error, when he was actually the attorney for the defendant Jeffrey Hartsog (Appellant's R.E. 4). Deputy Clerk of Hinds County Anita Wray confirmed through her written statement and by printing out the court docket that attorney Robert J. Arnold, III, was the only attorney that would have received any

notice of Judge Kidd's decision since he was the only attorney listed in the computer's court record (Appellant's R.E. 4).

Ignoring the fact that appellant nor appellant's attorneys did not receive notice of the adverse ruling, were not listed as attorneys of record with the court, and immediately filed a motion to reopen time for appeal after receiving opposing counsel's letter, Judge Kidd denied appellant's request to reopen time for appeal without explanation (Appellant's R.E. 5). It is from that ruling that appellant has filed his appeal before this court.

SUMMARY OF THE ARGUMENT

Clayton did not receive notice of Judge Kidd's adverse ruling, Memorandum Opinion and Order entered June 9, 2006 (Appellant's R.E. 1), until opposing counsel notified Clayton's attorneys through a letter dated July 13, 2006 (Please See Appellant's R.E. 2), and the time for Clayton to file an appeal had already run. Upon receiving opposing counsel's letter, attorneys for Clayton immediately filed a motion to reopen time for appeal (Appellant's R.E. 3). Further, counsel for Clayton through their own investigation became aware that the only attorney of record in the Hinds County Clerk's system was Robert J. Arnold, III, who was the attorney for the defendant/appellee Jeffrey Hartsog (Appellant's R.E. 4). Attached to Clayton's rebuttal in support of his motion to reopen time for appeal was a letter from the Hinds County Deputy Clerk Anita Wray affirmatively stating that the attorneys representing Clayton were not of record in the computer or listed on the docket and the docket documents were attached to the Clerk's letter (Appellant's R.E. 4). Pursuant to Mississippi Rule of Appellate Procedure 4(h), Clayton has met the requirements to receive fourteen (14) days in which to file his appeal.

Standard of Review

This Court has held that dismissals by the trial court are reviewed under an abuse of discretion standard. Pierce v. Heritage Properties, Inc., 688 So.2d 1385, 1388 (Miss. 1997) citing Palmer v. Biloxi Regional Medical Center, 564 So.2d 1346, 1368 (Miss. 1990).

The Facts

This case is on appeal as a result of Honorable Winston Kidd's denial of Clayton's motion to reopen time for appeal that stemmed from Judge Kidd's Memorandum Opinion and Order dated June 9, 2006 (Appellant's R.E. 1) that Appellant nor Appellant's counsel received. Said Memorandum Opinion and Order was never received or mailed to appellant or appellant's counsel, see letter from Deputy Clerk Anita Wray (Appellant's R.E. 4). Appellee's counsel sent a letter dated July 13, 2006 (Appellant's R.E. 2) which indicated for the first time that an adverse ruling had been handed down by Judge Kidd. Counsel's letter was the first notice and any form received by appellant or appellant's counsel.

Clayton immediately filed his motion to reopen time for appeal (Appellant's R.E. 3) and affirmatively stated that he had not received Judge Kidd's Memorandum Opinion and Order until after the time for appeal had run. Appellant presented the court with evidence (Appellant's R.E. 4) that the only attorney listed with the Hinds County Circuit Court for either party was Robert J. Arnold, III. Mr. Arnold was the only attorney listed of record and he was listed, in error, as the attorney for the plaintiff J. W. Clayton, Jr. (Appellant's R.E. 4) instead of counsel for defendant Jeffrey Hartsog. Deputy Clerk of Hinds County Anita Wray confirmed through her written statement and by printing out the court docket (Appellant's R.E. 4) that attorney Robert J. Arnold, III, was the only attorney that would have received any notice of Judge Kidd's decision since he was the only

attorney listed in the computer's court record.

Judge Kidd denied appellant's request to reopen time for appeal without explanation (Appellant's R.E. 5). Judge Kidd abused his discretion by ignoring the fact that appellant nor appellant's attorneys received notice of the adverse ruling, were not listed as attorneys of record with the court due to the Court's error, and ignoring the fact that the court was presented with evidence by way of a Clerk's letter and the docket report that confirmed Clayton's attorneys had not been notified of the adverse ruling.

ARGUMENT AND THE LAW

Clayton reiterates and incorporates his arguments contained in his appellant's brief. This reply brief will focus on refuting the arguments contained in Hartsog's brief.

I. Appellee Hartsog does not dispute that Appellant Clayton did not receive Honorable Winton Kidd's Memorandum Opinion and Order before Clayton's time for appeal had run.

As stated in Appellant's Brief, M.R.A.P. 4(h), allows the trial court for a limited time to reopen the time for appeal when there is a finding that notice of the entry of a judgment or order was not received from the clerk or any party. Clayton did not receive Honorable Winston Kidd's Memorandum Opinion and Order which was filed on June 9, 2006 until opposing counsel Trey Arnold forwarded a copy to the undersigned counsel attached to a letter dated July 13, 2006. Not only has undersigned counsel pled that the trial court's order was not received timely, but Deputy Clerk Anita Wray has also attested to such in her correspondence dated and signed on July 20, 2006 (Appellant's R.E. 4) which states:

"In the above referenced case, Mr. Robert J. Arnold, III, is the only attorney listed in the Circuit Clerk's computer as attorney of record. The Opinion and Order that is in question was entered in the Clerk's office on June 8, 2006. I was on

vacation that week so I cannot verify if this was mailed out to the attorneys. But since **Mr. Arnold is the only attorney listed on the computer**, it would stand to reason that **he would be the only one to have received a copy of the Opinion and Order**. (see attachment)”{emphasis added}

Hartsog did not state that Clayton or Clayton’s attorneys received a timely copy of Judge Kidd’s Opinion and Order, nor can he. Nor does Hartsog raise one legal argument, cite one case or cite one statute in his brief that would suggest that Clayton is not entitled to additional time to file his appeal. Further, Hartsog’s one page argument emphasizes that he won at the trial level and he attempts to argue that additional time for appeal should be denied due to the underlying facts of the case disregarding Clayton’s appellate rights. Further, Hartsog specifically avoids briefing the issue before this court, whether Judge Kidd abused his discretion by not allowing additional time for appeal when Clayton and Clayton’s attorneys have shown by affidavit and court documents that the trial court’s Opinion and Order was not received in their office until after the time for appeal had run. The most persuasive evidence that Clayton did not receive the trial court’s Memorandum Opinion and Order and that he should be granted additional time in which to appeal, other than the undersigned counsel’s attestation to such, is Deputy Clerk Anita Wray’s correspondence dated July 20, 2006 and the trial docket printed from the same day which undeniably shows that attorney Robert J. Arnold, III, was the only attorney listed in the record and mistakenly had Mr. Arnold listed as Clayton’s attorney (see Appellant’s R.E. 4).

II. Appellant Clayton met his burden of proof for additional time.

The party seeking relief under Rule 4(h) bears the burden of persuading the trial court of lack of timely notice, a specific factual denial of receipt of notice rebuts and terminates the presumption that mailed notice was received. Miss. R. App. P. 4(h) Comments citing Nunley v. City of Los

Angeles, 52 F.3d 792, 798 (9th Cir. 1995). Pursuant to the rule and case law, Clayton asserted that the Order was not received and further that no notice of any kind was received until opposing counsel's letter dated July 13, 2006 approximately 34 days after Judge Kidd's Order had been entered. Therefore, Plaintiff has satisfied part (a) of M.R.A.P. 4(h).

Additionally, M.R.A.P. 4(h) requires that no party be prejudiced by the reopening of the time for appeal. The comments to the Rules, in articulating how the term "prejudice" might be considered, state that: "Prejudice" means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. M.R.A.P. 4(h) Comments. The Defendant in this case did not argue or demonstrate any heightened condition of prejudice. Appellee's argument was simply one concerning time and money which, according to the comments to the appellate rule, does not cause the type of prejudice which demands a total denial of the opportunity to reopen the time for appeal. Thus, no prejudice was plead by appellee upon which Judge Kidd could deny appellant's motion to reopen the time for appeal.

III. Clayton did not receive notice of the Memorandum Opinion and Order until after his time for appeal had run.

The trial court abused its discretion by denying Clayton's motion to reopen time for his appeal. As stated above, Clayton nor his attorneys received notice of the adverse ruling until after the time for appeal had run and the opposing party will not be prejudiced by allowing time to file Clayton's appeal. An abuse of discretion standard requires that the decision of the lower court be affirmed unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." Cooper v. State Farm

Fire & Cas. Co., 568 So.2d 687, 692 (Miss. 1990). When considering this holding of the Court in light of the present facts, it is clear that the Circuit Court's denial of Appellant's motion to reopen time for appeal was an abuse of discretion. The Circuit Court first denied Appellant's request to pursue his claim by affirming the County Court's dismissal of the case. Due to the documented court clerk error (Appellant's R.E. 4), the Plaintiff did not receive notice of the Circuit Court's decision until after the time allowing the appeal had past. Upon notice by opposing counsel of the expiration of time allowing for an appeal (Appellant's R.E. 2) the Plaintiff timely made his Motion to the Circuit Court to reopen his time for appeal pursuant to M.R.A.P. 4(h)(Appellant's R.E. 3). Plaintiff's motion was denied by the court absent any explanation (Appellant's R.E. 5). Additionally, counsel for Clayton was not allowed to review the Order submitted to Judge Kidd that was prepared by Hartsog's attorney, Robert J. Arnold, III.

Attorneys for Clayton affirmatively stated that Judge Kidd's Memorandum Opinion and Order dated June 9, 2006 (Appellant's R.E. 1) was not received by their office. Such an affirmation is a specific factual denial that rebuts and terminates the presumption that mailed notice was received. See comments to M.R.A.P. 4(h). Further, counsel for Clayton did not have the additional burden of independently learning of an entry of judgment against him. The Comment to M.R.A.P. 4(h) states:

“where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on [a lack of excusable neglect, such as] a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal.”

Comment to M.R.A.P. 4(h) citing Nunley v. City of Los Angeles, 52 F.3d 792, 798 (9th Cir. 1995).

Since appellants stated that notice of Judge Kidd's Order (Appellant's R.E. 5) was not timely

received and further, proven to the Court that it was a clerical error, there can be no finding by this Court except to allow appellants additional time in which to properly appeal their case.

CONCLUSION

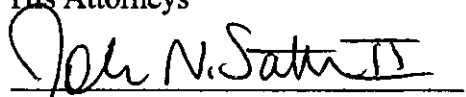
The trial court erred in denying Clayton's motion for additional time in which to file an appeal. Clayton's counsel stated to the trial court that they did not timely receive Judge Kidd's Memorandum Opinion and Order dated June 9, 2006 (Appellant's R.E. 1) until after the time for appeal had run. Further, evidence was presented to Judge Kidd that showed that the clerk's office had failed to list the correct attorney for Clayton and further that Clayton's attorneys were not listed as counsel of record anywhere in the court records and would not have received any mailings from the trial court (Appellant's R.E. 4). Judge Kidd abused his discretion by ignoring these facts and denying Clayton's motion for additional time in which to file his appeal. Therefore, the action of the Hinds County Circuit Court was not supported by credible evidence, was unreasonable, and a clear abuse of discretion.

WHEREFORE, PREMISES CONSIDERED, Clayton prays that the decision of the Hinds County Circuit Court be reversed and remanded and that this Court allow Clayton additional time in which to perfect his appeal.

RESPECTFULLY SUBMITTED, this the 27th day of June, 2007.

J. W. CLAYTON, JR.,
APPELLANT

BY: SINGLETARY & THRASH, P.A.
His Attorneys

BY: 
GARY D. THRASH
JOHN N. SATCHER, II

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day mailed, postage prepaid, through the U.S. Mail, a true and correct copy of the above and foregoing Appellant's Reply Brief and Excerpts to:

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Honorable William R. Barnett
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Honorable Winston Kidd
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So certified, this the 27th day of June, 2007.


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