

IN THE SUPREME COURT OF MISSISSIPPI

J. W. CLAYTON, JR.

APPELLANT

VERSUS

CASE NO.: 2006-CA-01694

JEFFREY HARTSOG

APPELLEE

BRIEF OF THE APPELLANT

ATTORNEYS FOR APPELLANT:

**GARY D. THRASH / MSB# [REDACTED]
JOHN N. SATCHER, II / MSB# [REDACTED]
SINGLETARY & THRASH-JACKSON, P.A.
POST OFFICE BOX 587
JACKSON, MS 39205-0587
(601) 948-7410**

IN THE SUPREME COURT OF MISSISSIPPI

J. W. CLAYTON, JR.

APPELLANT

VERSUS

CASE NO.: 2006-CA-01694

JEFFREY HARTSOG

APPELLEE

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	3
The Facts	4-5
ARGUMENT AND THE LAW	5-8
Appellant met the requirements of Miss. R. App. P. 4(h)	5-6
The lower court abused its discretion by denying appellant's motion to reopen time for appeal	6-8
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Authority	Page(s)
<u>Cooper v. State Farm Fire & Cas. Co.</u> 568 So.2d 687, 692 (Miss. 1990)	7
<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)	3
<u>Pierce v. Heritage Properties, Inc.</u> 688 So.2d 1385 (Miss. 1997)	3
Miss. R. Civ. P. 77	5
Miss. R. App. P. 4(a)(6)	5
Miss. R. App. P. 4(h)	5, 6, 7

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.

IN THE SUPREME COURT OF MISSISSIPPI

J. W. CLAYTON, JR.

APPELLANT

VERSUS

CASE NO.: 2006-CA-01694

JEFFREY HARTSOG

APPELLEE

BRIEF OF APPELLANT, J. W. CLAYTON, JR.

COMES NOW THE APPELLANT, J. W. Clayton, Jr. (hereinafter “Appellant” or “Clayton”), and files this his Appellant’s 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 “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 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

I. Appellant Met the Requirements of Mississippi Rule of Appellate Procedure 4(h).

Mississippi Rule of Appellate Procedure 4(h) was added in 1997 as a companion to Mississippi Rule of Civil Procedure 77. Primarily the new rule gave some limited opportunity for relief from the strict sanctions that an appellant faced when his notice of appeal was filed late because of no receipt of notice of entry of a judgment or order. M.R.C.P. 77(d) requires the court clerk to immediately furnish copies of all orders and judgments to those parties who are not in default for failure to appear. Miss. R. Civ. P. 77 Comments. M.R.A.P. 4(h), which is patterned after Fed. R. App. P. 4(a)(6), 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. The rule states as follows:

The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal. M.R.A.P. 4(h).

In this matter, the Plaintiff did not receive notice of the entry of the Circuit Court's Order (Appellant's R.E. 5) within 21 days of the June 9, 2006 entry. Plaintiff only received notice of the entry of the Order when opposing counsel, in a letter dated July 13, 2006 (Appellant's R.E. 2), advised the Plaintiff's counsel that the time for appeal had run. This notice came approximately 34 days after the entry of the court's order. Investigation by the Plaintiff led to the discovery that the only attorney of record in the Circuit Clerk's files was Defendant's attorney (Appellant's R.E. 4).

Although, 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.

II. The Lower Court Abused Its Discretion By Denying Appellant's Motion to Reopen Time For Appeal.

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

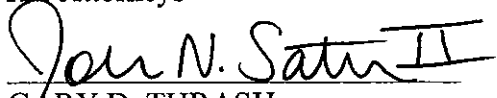
The trial court erred in denying Clayton's motion for additional time in which to file an appeal. Clayton's counsel stated to the trial court that they did not timely receive Judge Kidd's Memorandum Opinion and Order dated June 9, 2006 (Appellant's R.E. 1) until after the time for appeal had run. Further, 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 12th day of APRIL, 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 Brief and

Excerpts to:

Robert J. Arnold, III, Esq.
Daniel Coker Horton & Bell, P.A.
P.O. Box 1084
Jackson, MS 39215-1084

Honorable William R. Barnett
County Court of Hinds County
P.O. Box 327
Jackson, MS 39205

Honorable Winston Kidd
Circuit Court of Hinds County
P.O. Box 327
Jackson, MS 39205

So certified, this the 12th day of APRIL, 2007.


GARY D. THRASH
JOHN N. SATCHER, II

GARY D. THRASH / MSB# [REDACTED]
JOHN N. SATCHER, II / MSB# [REDACTED]
SINGLETERY & THRASH, P.A.
P.O. BOX 587
JACKSON, MISSISSIPPI 39205
(601) 948-7410