

IN THE SUPREME COURT OF MISSISSIPPI

TERRY E. SHELTON

APPELLANT

V.

CAUSE NO. 2006-CA-01750

LIFT, INC.

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.

- Terry E. Shelton, Appellant;
- Michael G. Thorne, Counsel for Appellant;
- Lift, Inc., Appellee;
- M. Reed Martz, representatives of Appellee;

Attorney of Record for Lift, Inc.


M. REED MARTZ

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TABLE OF CONTENTS

Certificate of Interested Persons	1
Table of Contents	2
Table of Cases and Other Authorities	3
Statement on Oral Argument	4
Statement of the Issues	5
Statement of the Case	6
Summary of the Argument	8
Argument	9
A. <i>Standard of Review</i>	9
B. <i>Inadvertence and/or Mistake Does Not Constitute Good Cause</i>	9
C. <i>The Trial Court Did Not Err in Stating the Dismissal Was To Be With Prejudice Where the Statute of Limitations Had Expired</i>	13
Conclusion	14
Certificate of Service	15

TABLE OF CASES AND OTHER AUTHORITIES

STATUTES

MISS. CODE ANN. § 15-1-49	13
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CASES

<i>Crumpton v. Hegwood</i> , 740 So. 2d 292 (Miss. 1999)	11
<i>Delta & Pine Land Co. v. Burns</i> , 926 So. 2d 901 (Miss. 2006)	9
<i>Heard v. Remy</i> , 2005-CA-01556-SCT (Miss. 2006)	9, 11, 13
<i>Holmes v. Coast Transit Auth.</i> , 815 So. 2d 1183 (Miss. 2002)	9, 13
<i>In Re Holtzman</i> , 823 So. 2d 1180 (Miss. 2002)	11, 12, 13
<i>Jones v. Miss. State Univ.</i> , 2006-CA-00223-COA (Miss. Ct. App. 2007)	11
<i>LeBlanc v. Allstate Ins. Co.</i> , 809 So. 2d 674 (Miss. 2002)	11
<i>Pincay v. Andrews</i> , 389 F.3d 853 (9 th Cir. 2004)	12
<i>Powe v. Byrd</i> , 892 So. 2d 223 (Miss. 2005)	10
<i>Rains v. Gardner</i> , 731 So. 2d 1192 (Miss. 1999)	9, 11
<i>Triple "C" Transp., Inc. v. Dickens</i> , 870 So. 2d 1195 (Miss. 2004)	13
<i>Watters v. Stripling</i> , 675 So. 2d 1242 (Miss. 1996)	11, 12, 13

OTHER AUTHORITY

MISS. R. CIV. P. 4	6, 7, 9, 10, 14
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STATEMENT ON ORAL ARGUMENT

Oral Argument Not Requested.

Lift, Inc. believes the issues presented to the Court in this appeal are clear issues of law which have previously been addressed by this Court and thus do not present new or novel situations for interpretation or ruling. Accordingly, Lift does not believe oral argument will be beneficial to the resolution of this matter unless the Court has specific questions which it would like addressed by counsel.

STATEMENT OF THE ISSUES

1. Whether the trial judge abused her discretion in finding good cause did not exist to excuse the failure of the Plaintiff to timely obtain service of process upon the Defendant where said failure was the result of simple inadvertence and where no request for an extension of the service period was received until approximately four months after the statute of limitations had expired.

2. Whether the trial judge abused her discretion by dismissing the case with prejudice when the statute of limitations had already expired.

STATEMENT OF THE CASE

This appeal stems from the dismissal of a cause of action because of a simple miscalculation. Abundant case law on point with this issue makes clear that this honest error does not constitute “good cause” excusing the Plaintiff’s failure to timely effectuate service.

The underlying tort action stems from an automotive accident on November 12, 2002, in Lee County, Mississippi. Record page 4. A Complaint was filed on behalf of the Plaintiff, Terry E. Shelton, on November 9, 2005, leaving three days on the three statute of limitations. Record page 3; Transcript at page 12, lines 23-25. The Plaintiff’s 120 days for service pursuant to MISS. R. CIV. P. 4(h) expired on March 9, 2006. Transcript at page 21, lines 13-21. Service of process was not served upon Defendant, Lift, Inc., until April 5, 2006, nearly a month after the Plaintiff’s allotted time had expired. Record page 24. Lift, Inc. then filed an Answer and a Motion to Dismiss on May 5, 2006, raising as a defense and reason for dismissal the Plaintiff’s failure to obtain timely service. Record pages 11-16.

71 days after receipt of the Defendant’s Motion to Dismiss and 127 days after the expiration of the time for service, on July 14, 2006, the Plaintiff filed a Motion to Allow Out-Of-Time Service, Or, In the Alternative, Motion For Leave To Serve Process Out of Time. Record pages 50-52. The basis for the Plaintiff’s Motion was that a staff member had “unintentionally” omitted an entire month in calculating the deadline for service. Record pages 50-51. Lift, Inc. responded with its consolidated Response and Amended Motion to Dismiss, this time requesting dismissal with prejudice due to the expiration of the statute of limitations. Record page 55.

At a hearing held on September 5, 2006, after considering arguments of counsel and testimony from the member of Plaintiff’s firm who had made the miscalculation, the trial judge

determined that the “honest mistake” in calculating the service deadline did not rise to the level of “good cause” as set forth in Miss. R. Civ. P. 4(h) and thus dismissed the action pursuant to that rule. Transcript at pages 20-21. Finding that the applicable three year statute of limitations had since expired, the trial judge exercised her authority and properly found said dismissal should be with prejudice. Transcript at page 21, lines 13-21. The Plaintiff then filed a document entitled “Complaint Counsel’s Motion to Reconsider Judgment of Dismissal With Prejudice” on September 19, 2006. Record page 87-88. Lift, Inc. responded on October 2, 2006. Record pages 94-95. Prior to a ruling on said motion, Plaintiff filed his Notice of Appeal on October 10, 2006. Record pages 96-97.

SUMMARY OF THE ARGUMENT

The trial court's order is supported by substantial evidence. After having heard testimony, received arguments from counsel and reviewed the applicable law, the trial judge correctly concluded that "good cause" excusing the failure to effectuate service was absent. The trial court reached the proper conclusion given that the Plaintiff admitted to having committed a simple mistake which as a matter of settled law does not constitute good cause. Moreover, the Court's decision is supported by substantial evidence because the delay in service was the Plaintiff's purposeful postponement of process during negotiations. Finally, the Plaintiff's delay of several months in bringing his motion for additional time for service does not justify a finding of either excusable neglect or good cause.

The trial judge was well within her authority and acting pursuant to Court permission by calculating the expiration of the statute of limitations and holding that the dismissal under Rule 4(h), which would normally be without prejudice, should be with prejudice since the applicable statute of limitations had run six months earlier. This decision was in the interest of judicial economy and efficiency and should be commended.

ARGUMENT

a. Standard of Review

Appellate courts review a trial court's determination of whether good cause exists to excuse non-compliance with Miss. R. Civ. P. 4(h) on an abuse of discretion standard and are bound to uphold the trial court's decision where there exists substantial evidence to support the determination. *See Heard v. Remy*, 2005-CA-01556-SCT, ¶ 21 (Miss. 2006), citing *Rains v. Gardner*, 731 So. 2d 1192, 1196 (Miss. 1999). The trial court's dismissal of the case is reviewed de novo. *Delta & Pine Land Co. v. Burns*, 926 So. 2d 901, 904 (¶10) (Miss. 2006).

b. Inadvertence and/or Mistake Does Not Constitute Good Cause

Miss. R. Civ. P. 4(h) provides that unless "good cause" can be shown for the failure to serve a summons and complaint within 120 days of filing, a case should be dismissed without prejudice. Miss. R. Civ. P. 4(h); *see also Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1185 ¶ 7 (Miss. 2002) (en banc). It was the Plaintiff's burden to establish good cause before the trial court. *Id.* at page 1185.

It is suggested to the Court that the Plaintiff's brief contains a misleading legal analysis. The Plaintiff's sole issue and argument on appeal is that the trial court erred in failing to find "excusable neglect" justifying his "inadvertent miscalculation of the date for service of process." Appellant Brief at page 4-5. The Plaintiff's brief fails to point out that a motion for additional time, such as he filed before the trial court, requires that the Plaintiff show not only "excusable neglect" justifying his failure to timely file a request for an extension, but *also* good cause for his failure to effectuate service. *See Heard*, 2005-CA-01556-SCT at fn. 1 (stating motion for extension of time after initial 120 days "requires a finding of excusable neglect" and additionally requires the movant "meet the

M.R.C.P. 4(h) burden of showing good cause” for failure to serve process before an extension may be granted). Thus, the Plaintiff’s brief focuses exclusively on the first of a two part test and does not give any “good cause” for his delay in attempting to serve process upon the Defendant. Also note, as per the Statement of the Case on page 6 *supra*, the Plaintiff did not file a motion for additional time until July 14, 2006, 71 days after receipt of the Defendant’s Motion to Dismiss and 127 days after the expiration of the time for service. This unexplained delay should not constitute “excusable neglect” justifying giving him additional time for service.

In this matter, service was not effectuated until April 5, 2006. This was solely the result of the Plaintiff’s delay in attempting service as the Defendant in no way sought to avoid process. Transcript at page 17, lines 2-4 (Q: “When was the first time that you actually tried to get service on the defendant?” A: “The day he was served.”). As the trial court pointed out, the record clearly shows the Plaintiff did not immediately seek to effectuate service but instead purposely (and at his own peril) waited several months before even attempting service upon the Defendant. Transcript at page 21, lines 2-8 (“I think it is important in this case, very important, to note that counsel elected to ride out the 120 days . . .”) This Court made a similar point in the case of *Powe v. Byrd*, 892 So. 2d 223, 226 (Miss. 2005), when it stated the plaintiff’s waiting until the last day of the 120 day period before attempting service did “not constitute diligence in effecting service.” The *Powe* Court also noted that it “has set a high standard for establishing good cause” and the alleged error by counsel’s staff compounded with their delay did not meet that standard. *Id.* at 226-27.

This Court on several occasions has had the opportunity to explain what constitutes good cause excusing timely service of process. In each of these cases the Court has affirmed that a simple mistake, such as is alleged in this suit, is insufficient.

For instance, in the case of *Heard v. Remy*, Heard contended that her failure to serve Remy was the result of inattention to instructions by a member of her counsel's law firm. *Heard*, 2005-CA-01556-SCT at ¶ 20. In upholding the trial court's determination that good cause was not demonstrated, the Court re-affirmed the principal that simple inadvertence or mistake of counsel does not usually suffice as good cause. *Id.* at ¶ 21. In *Heard* the plaintiff did not attempt service at all during the 120 day period, evidencing a "lack of diligence beyond excusable neglect." *Id.* Note, as above, that Plaintiff's first attempt at service also came after the 120 day period expired and would have been just mere days before the expiration of the period had the deadline been correctly calculated. Transcript at page 17, lines 2-4

The facts in *In Re Holtzman*, 823 So. 2d 1180 (Miss. 2002) are also analogous to those at bar. In *Holtzman*, the plaintiff's attorney failed to effectuate service of process within 120 days due to a mistake made by his paralegal and file clerk. *Id.* at 1182. Specifically, the attorney's paralegal and file clerk "filed the complaint and the summons away," causing service to never be effectuated. *Id.* The Court described the situation "as clear an example as one could wish of 'simple inadvertence or mistake of counsel.'" *Id.* at 1183. Affirming the trial court's denial of plaintiff's motion for an extension of time and the dismissal with prejudice, the Court noted that "***we have consistently held that 'simple inadvertence or mistake of counsel' is neither good cause nor excusable neglect.***" *Id.* at 1184 (emphasis added), citing *LeBlanc v. Allstate Ins. Co.*, 809 So. 2d 674, 678 (Miss. 2002); *Crumpton v. Hegwood*, 740 So. 2d 292, 294 (Miss. 1999); *Rains*, 731 So. 2d at 1196; *Watters v. Stripling*, 675 So. 2d 1242, 1243 (Miss. 1996). See also *Jones v. Miss. State Univ.*, 2006-CA-00223-COA, ¶ 9 (Miss. Ct. App. 2007) (affirming trial court dismissal under Rule 4 where plaintiff did not serve attorney general until beyond 120 period - service on wrong person was not good cause or

excusable neglect and thus dismissal was required). The *Holtzman* Court supported its holding by noting, just as is the situation here, that the plaintiff never alleged that any defendants attempted to avoid service, could not be found, were unknown, or any other reason establishing good cause. *Id.* at 1184.

The Ninth Circuit Court of Appeals case cited by the Plaintiff,¹ *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004) is inapplicable to this situation. Foremost, as shown above, Mississippi has clearly addressed the same exact issues present in this suit and has uniformly rejected the Plaintiff's argument that the four factor test weighs in favor of finding excusable neglect. *See Watters*, 675 So. 2d at 1244 (internal citations omitted) ("The fact that dismissal may work to preclude this action because of the running of the statute of limitations is of no consequence. Thus, dismissal was proper.") Additionally, when analyzing the four factors given by the *Pincay* court, it is manifest that they weigh heavily in favor of the Defendant. As the Plaintiff concedes at page 8 of his brief, the "clearly" most important factor is the reason for delay. Here, the reason for the delay was the Plaintiff's counsel's inaction and had nothing to do with acts or omissions on the part of the Defendant. Transcript at page 17, lines 2-4; Record at page 43 (defendant acknowledgment of suit the day after service and stating that the Complaint would be forwarded for defense). The second most important factor, that of the danger of prejudice, also weighs in favor of Lift, Inc. since the statute of limitations, even after being tolled 120 days, had expired for three weeks prior to service upon Lift, Inc. Transcript at page 21, lines 13-21; Record at page 83, paragraph 3. It is obviously prejudicial to Lift, Inc. to be hailed into court three years, four months and three weeks after an

¹ The undersigned finds it significant that the Plaintiff did not cite any Mississippi authority to support his position, but instead looked clear across the country to the most frequently overturned Circuit Court of Appeals in the land.

accident - a time at which one could reasonably expect the statute of limitations to bar such a claim.

c. **The Trial Court Did Not Err in Stating the Dismissal Was To Be With Prejudice Where the Statute of Limitations Had Expired**

The automotive accident at issue was subject to the general three year statute of limitations found in MISS. CODE ANN. § 15-1-49(1). As the accident occurred on November 12, 2002, the statute was set to expire on November 12, 2005. The filing of the Plaintiff's Complaint had the effect of tolling this period for 120 days. *Heard*, 2005-CA-01556-SCT at ¶ 15, citing *Triple "C" Transp., Inc. v. Dickens*, 870 So. 2d 1195, 1199 (Miss. 2004), *Watters*, 675 So. 2d at 1244. However, on the 121st day, the remaining three days on the statute of limitations began running automatically. *Holmes*, 815 So. 2d at 1185. Once the statute began running again, the three remaining days expired on March 13, 2006. Record at page 85, paragraph 10.

The trial judge, having denied the Plaintiff's motion for enlargement of time in which to serve process and failing to find a good cause excuse for the Plaintiff's failure to effectuate service, was entirely correct and within her discretion to dismiss the matter with prejudice at the hearing held on September 5, 2006. This Court has countenanced similar findings before. In *Holtzman*, the Court stated in fn. 1 that "the judge was within his authority to calculate the dates and conclude that, because the underlying three-year statute of limitations had run some seven months prior to the date of his order, dismissal with prejudice was proper." *Holtzman*, 823 So. 2d at 1182.² Allowing the trial court this freedom is entirely reasonable and is in fact in the interest of judicial economy insofar as it prevents the plaintiff from re-filing what would clearly be a barred suit, thereby obviating strain on the circuit clerk, administrative office of courts and, perhaps most importantly, the circuit judge

² As noted, the statute of limitations expired almost six months prior to the order in this case.

as he/she is spared the need for a dispositive motion and hearing.

CONCLUSION

The Plaintiff's counsel's firm made an honest and understandable mistake. However, the trial court correctly determined that the Plaintiff had failed to show either excusable neglect or a good cause excuse in light of the uniform and ample case law holding that "simple inadvertence or mistake of counsel" does not rise to the level required by Miss. R. Civ. P. 4(h) in order to prevent dismissal of an action. Therefore, the dismissal by the trial court must be affirmed. Furthermore, the trial court was well within its authority, as has previously been recognized by this Court, in calculating the expiration of the statute of limitations and stating that the dismissal was with prejudice. The trial court's order of dismissal should be affirmed in its entirety.

WHEREFORE, PREMISES CONSIDERED, Lift, Inc. prays this Court affirm the decision of the trial court and tax all costs to the Appellant.

LIFT, INC.

BY: MARKOW WALKER, P.A.


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CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Defendant Lift, Inc., do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***Brief of Appellee*** to:

Michael G. Thorne, Esq.
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Honorable Sharion Aycock
Lee County Circuit Court
Post Office Box 1100
Tupelo, Mississippi 38802

This the 3 day of May, 2007.



M. REED MARTZ