IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SUPREME COURT #2006-CA-01750

APPELLANT, TERRY E. SHELTON

V.

APPELLEE, LIFT, INC.

APPELLANT'S BRIEF

Michael G. Thorne
Attorney for the Appellant

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LIFT, INC. — APPELLEE

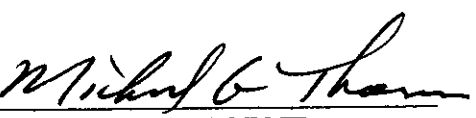
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certified that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Honorable Justices of this Court may evaluate possible disqualification or recusal:

1. Terry E. Shelton, Appellant
2. Honorable M. Reed Martz, Counsel for Appellee on Appeal
3. Honorable Michael G. Thorne, Counsel for Appellant on Appeal
4. Honorable Sharion Aycock, Circuit Court Judge

WITNESS my signature on this the 23rd day of April, 2007.

ATTORNEY FOR APPELLANT



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STATEMENT OF ISSUES

1. The trial court's failure to find that Mr. Shelton's counsel's paralegal's inadvertent miscalendaring of the expiration date of service of process did not constitute excusable neglect was in error.

STATEMENT OF THE CASE

On November 12, 2002, Terry E. Shelton, a blind handicapped adult resident citizen of Tupelo, Lee County, Mississippi, placed a call to Lift, Inc. to transport him to his place of employment within the city limits of Tupelo. On this date, an employee with Lift, Inc. arrived at Mr. Shelton's address to transport him to his place of employment. Upon entering the Lift, Inc. bus and being seated, Mr. Shelton sensed the presence of another unknown passenger on the bus. As the driver proceeded, she passed the unknown passenger's destination. At that point, the driver put the bus in reverse and proceeded backwards at which time she backed into another vehicle, causing a sudden backward motion of Mr. Shelton's head and neck. The driver of the Lift, Inc. bus then proceeded forwards and applied her brakes, stopping abruptly. This forward lunge and quick stop then caused a sudden forward motion of Mr. Shelton's head, neck and body. No police officer was called to the accident scene by Lift, Inc.'s driver. The driver transported Mr. Shelton to his place of employment. Shortly after arriving at his work place, Mr. Shelton began to experience severe pain in his neck, dizziness and believed to have blacked out. Mr. Shelton was transported by ambulance to the North Mississippi Medical Center.

As a result of this incident, Mr. Shelton filed suit against Lift, Inc. in the Circuit Court of Lee County on November 9, 2005, (RE 3-6) within the applicable statute of limitations and summons was issued by the clerk to Lift, Inc. at that time (RE 23). Consequently, Mr. Shelton was allocated 120 days from November 9, 2005 to serve process upon Lift, Inc.. Accordingly, Barbara Johnson, the paralegal employed by Mr. Shelton's counsel calendared the date that service of process to Lift, Inc. to be served within 120 days of the November 9, 2005 institution of the lawsuit.

Because the Complaint was filed near the end of calendar year 2005, Ms. Johnson was

cognizant that the date for service of process to Lift, Inc. would expire sometime in early 2006. Accordingly, Ms. Johnson consulted her 2006 desk calendar and inadvertently calculated the date for expiration of service to be April 8, 2006. The reason for this miscalculation was that Ms. Johnson relied exclusively on the small inset calendar months denoted on the top of her desk calendar, and – because she was relying on the primary January, 2006 calendar which contained a week by week listing of January, 2006 – thus failed to note the 31 day period of that month was not accounted for in the small inset calendars included on the top of the primary calendar. (RE 38). Accordingly, Ms. Johnson inadvertently failed to account for the entire 31 day period of January, 2006 in making her calculation as to the correct expiration date for service of process to Lift, Inc.[1] Thus, had the calculation been correct, the actual date of expiration for service of process would have been March 9, 2006, rather than the miscalculated date of April 8, 2006.[2]

Service was obtained upon Lift, Inc. on April 6, 2006, four days short of the miscalculated date for expiration of service of process (accounting for April 8, 2006 being a Saturday, see note 1). (RE 24). Because service of process was had a few weeks beyond the expiration of the proper date – had it been correctly calculated – Lift, Inc. moved for a dismissal of the underlying cause of action and that motion was granted by the Circuit Court. (RE 83-85).

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[1] Ms. Johnson's testimony in this regard is recounted and explicated at pp. 9-10 below.

[2] Because April 8, 2006 fell on a Saturday, the actual date of expiration for service of process would have been April 10, 2006, had Ms. Johnson's calculations not been in error.

SUMMARY OF THE ARGUMENT

The trial court's failure to recognize Mr. Shelton's counsel's paralegal, inadvertent miscalculation of the date for service of process in this complaint constituted Excusable Neglect, resulting in the trial court's dismissal of the underlying action with prejudice, is reversible error.

ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO FIND THAT MR. SHELTON'S COUNSEL'S PARALEGAL'S INADVERTENT MISCALENDARING OF THE EXPIRATION DATE OF SERVICE OF PROCESS DID NOT CONSTITUTE EXCUSABLE NEGLECT WAS IN ERROR.

The dismissal of the underlying cause of action in this case can be distilled in the trial court's dispositive decision to grant Lift, Inc.'s motion to dismiss upon Shelton's failure to effect service of process within the allocated time period. That dismissal was founded in its entirety upon the trial's court abject refusal to recognize that mistakes can be made by even the most discerning of trial counsel and that counsel's support staff.

Indeed, practically the identical factual scenario as that which is present here was recently the subject of consideration by an en banc panel of the Ninth Circuit Court of Appeals in *Pincay v. Andrews*, 389 F3d 853 (2004). In *Pincay*, the Court affirmed a district court's finding of excusable neglect – and thus its decision to extend a party's time to appeal – when a lawyer left to a paralegal serving as his law firm's calendaring clerk responsibility for calendaring appellate deadlines and the paralegal calendared the wrong date. The decision in *Pincay* is noteworthy because courts have traditionally rejected the notion that a lawyer's delegation of tasks to another lawyer or to a non-lawyer employee amounts to excusable neglect if the other lawyer or staff member errs.

The Ninth Circuit's determination that the paralegal's miscalendaring of the deadline for appeal in that case deserves particular consideration because, in contrast to the facts of the instant matter, the paralegal in that case inadvertently misread the clear language of Rule 4(a)(1) of the federal rules which provides that a litigant has 60 days in which to ask for an extension of time in

which to bring an appeal when the federal government is a party to the case, but has only 30 days to bring a similar motion when only private litigants are involved. See *Pincay* at 854. The instant matter, of course, involves no misinterpretation or misunderstanding of the rules for service of process, but, instead, involves only a quite readily explainable miscalculation of the relevant time period in which to effect service of process.[3]

Nevertheless, the *Pincay* court determined that the paralegal's inadvertent misreading of the applicable rule was excusable neglect. Excusable means appropriate to excuse, not necessarily a good reason to excuse. Moreover, neglect is merely a failure to do something or carry out a task or duty.

In determining whether excusable neglect exists, *Pincay* court applied a 4-factor test from a previous case. The facts are: (1) the danger of unfairness to the other party; (2) the length of delay and the impact it will have on the case; (3) the reason for the delay, including whether it was within the reasonable control of the party; and (4) whether the party's conduct was in good faith. *Pincay* at 855-56 (citing *Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership*, 507 U.S. 380 (1993)). The court found that since there was no unfairness, and that the length of the delay was small coupled with the fact that the delay was due to good faith carelessness, the reliance on the paralegal's mistake constitutes excusable neglect. Therefore, the court granted the defendant's extension and allowed for the filing of the notice of appeal.

Where the movant – in this instance, Terry Shelton – bears no fault related to the requested extension, as where the extension is necessitated by events beyond the movant's control, the good cause standard applies. Where there is fault, excusable neglect is the measure. As a leading treatise explains:

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[3] See pp. 9-10 below.

> The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault – excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.
>
> Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.[4]

Good cause is a relatively easy standard to apply and it is rarely invoked. Disputes involving a request for an extension of time under Rule 4(a)(5) mostly turn on the meaning of excusable neglect. Courts long held neglect to be excusable "only in unique or extraordinary circumstances." Then, in 1993, the Supreme Court endorsed a more generous interpretation of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*.

Where appropriate, federal courts may "accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." In determining whether to allow late filings, circumstances that courts should consider include "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the

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[4] 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 304App.07[2], at 304App.-34 (3d ed. 1997 & Supp.2004).

movant, and whether the movant acted in good faith."

Although decided in the bankruptcy context, the *Pioneer* approach logically applies to controversies under other rules where excusable neglect is the standard for granting extensions of time, such as Rule 4(a)(5). Thus, in deciding whether to allow a party to file a notice of appeal out of time, a court should consider (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. These four factors do not bear equal weight; the third factor – the reason for the delay – clearly is the most important. This makes sense, because the first, second and fourth factors easily favor the movant in most cases; non-moving parties are seldom prejudiced because delays in this context are usually short, and delays attributable to bad faith are exceedingly rare.

When it comes to the reason for the delay, it is important to understand that even under the equitable and flexible *Pioneer* standard not any excuse will suffice. The moving party still must offer a "satisfactory explanation" for its tardiness.

Considering the factual situation with which the court was confronted in *Pincay*, and applying the legal principles enunciated therein, appellant, Terry E. Shelton, respectfully submits that the requisite "satisfactory explanation" which the Ninth Circuit, relying on the United States Supreme Court's decision in *Pioneer*, deemed necessary for a litigant to demonstrate in order to overcome a strict application of the statutory time period where "excusable neglect" is the standard for granting an extension of time, is abundantly present here.

Indeed, quite unlike the situation found in *In re Holtzman*, 823 So.2d 1180(Miss. 2002)[5], upon which the trial court relied in dismissing Mr. Shelton's complaint, wherein plaintiff's counsel in that matter simply "lost track" of the case after it was filed only to later "find" the case lurking undiscovered when "(m)y paralegal does a review of all cases every few months or so, six months or so..."[6], here Shelton's counsel's paralegal explicitly stated that... "it's not like I put everything in the file and just kind of stored it away. I have been working constantly keeping up with Mr. Shelton, his doctors (meaning that Ms. Johnson was keeping abreast of Shelton's changing medical condition)"[7].

Ms. Johnson further testified that:

> ... I circled November the 9th (2005, the date Shelton's suit was filed), in these small calendars up here (at the top of the page of the main desk calendar in which Ms. Johnson was relying)...I knew process had to be served by April the 8th (2006). I've got that circled. That would have been my 120 days...
>
> ... after process was served and we received the answer along with (Lift's) motion to dismiss, I thought I would throw up (due to the miscalendaring of the date of service of process because of the mistaken omission of the 31 day period of January). ...I had people at (Shelton's counsel's) law office to look (at the calendar upon which Ms. Johnson had relied). Nobody saw where I made a mistake.
>
> ...
>
> ...If I can hold (the calendar) up (in order to explain the calculation process). ... here (the top of the page which she was consulting) is

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[5] Quite interestingly, we note that in the very motion prepared by defendant/appellee, Lift, Inc., asking that Plaintiff's complaint be dismissed due to an inadvertent mistake, Lift's own counsel initially cites *Holtzman* as being found at "883 S2d", rather than the above noted correct citation which said counsel correctly cites two paragraphs below the initial incorrect citation. See RE 56. Doubtlessly, counsel's mistake can be attributed to a "slip of the finger" on the part of his support staff in preparing the motion. Apparently, only defense counsel is permitted to make "inadvertent mistake"!

[6] See *Holtzman*, **823** S2d at 1181.

[7] See Court Transcript at pp. 13.

> January (2006). (The January 2006 page) has November (2005) all the way through July (2006). So I started with November the 9th (2005) and I have marked right here (April 8, 2006) counting 120 days. And then it was only after (I) just kept looking and looking (that I discovered) the month of January, it's November, December, February, March, April. Here is January right here (*i.e.* the enlarged calendar page which Ms. Johnson was principally utilizing)[8].
>
> * * * * *

Ms. Johnson's compelling account of her miscalendaring of the correct date of the service of process in this matter and the reason that this occurred, conclusively distinguishes this case from the facts which this Honorable Court confronted several years ago in the *Holtzman* matter. It is quite apparent that the present situation is much more akin to that addressed by the Ninth Circuit in the *Pincay* case. Indeed, the calendaring mistake committed here is much more readily understandable and explicable than that of the "Boise" paralegal in the *Pincay* case because, here, we encounter no similar misreading of a delineated rule. Instead, the present matter involved only a failure to account for a 31 day period (nobody likes January anyway) attributable to a calendar misreading

Clearly, this is the sort of "satisfactory explanation" necessary to allow for an expansion of time to file a particular motion, or to complete a necessary procedural step – in this case, the service of process – according to the criteria enunciated by the United States Supreme Court in *Pioneer* which was thereupon cited by the Ninth Circuit when rendering its decision in *Pincay*.

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[8] See Court Transcript at pp. 13. (Parenthetical information supplied in the interest of clarity; intervening question of Mr. Thorne omitted.)

It necessarily follows, accordingly, that the trial court, in dismissing this case *with* prejudice, committed reversible error.[9]

[9] Even if one assumes that the trial court acting correctly in dismissing this matter due to Shelton's failure to effect service within the time period allocated by Rule 4(h), it is, nevertheless, manifestly apparent, according to the clear mandate of this Court, that that dismissal should have been *without* prejudice. See *e.g., Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1187 (Miss.2002); *In re Holtzman, supra*, p. 1184, footnote 2.

CONCLUSION

Based on the foregoing facts and authorities, the Appellant, Terry E. Shelton, respectfully submits that the Order of the Circuit Court of Lee County, Mississippi, wherein the present matter was dismissed with prejudice for failure to effect service on the Appellee, Lift, Inc., within the time period prescribed pursuant to Rule 4 of the Mississippi Rules of Civil Procedure, must be reversed and this cause remanded to the Lee County Circuit Court for further proceedings on the merits of the case.

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COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRY E. SHELTON — APPELLANT

VS. — NO.: 2006-CA-01750

LIFT, INC. — APPELLEE

CERTIFICATE OF MAILING

THIS is to certify that I, Michael G. Thorne, attorney for Appellant, have this day mailed by United States mail, postage prepaid, the original and three copies of the Appellant's Brief to the Honorable Betty W. Sephton, Clerk, Supreme Court of Mississippi at the address of said Court, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 23rd day of April, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MICHAEL G. THORNE, the attorney for the Appellant, do hereby certify that I have this day served a true and correct copy of the Appellant's Brief, by placing said copy in the United States Mail, postage prepaid, addressed to the following:

Honorable M. Reed Martz
Markow Walker, P.A.
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Oxford, Mississippi 38655

Honorable Sharion Aycock
Circuit Judge
Post Office Drawer 1100
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Ms. Betty W. Sephton
Supreme Court of Mississippi Clerk
Post Office Box 249
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THIS the 23rd day of April, 2007.

MICHAEL G. THORNE