IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DARRELL KING AND MARY KING	**APPELLANTS**
VS.	**NO. 2008-CA-01800**
CHARLES E. BUNTON III MISSISSIPPI HOUSING AUTHORITIES RISK MANAGEMENT, INC.; and HOUSING AUTHORITY OF THE CITY OF VICKSBURG	**APPELLEES**

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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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:

A. Darrell King, Appellant;

B. Mary King, Appellant;

C. Charles E. Bunton, III, Appellee

D. Housing Authority of the City of Vicksburg, Appellee

E. Mississippi Housing Authorities Risk Management, Inc., Appellee

F. David A. Barfield and Steven L. Lacey, Barfield & Associates, Attorneys at Law, P.A., Counsel for Appellees;

G. Raju Aundre Branson, Esq. Counsel for Appellants;

H. Isadore W. Patrick, Circuit Judge, Warren County, Mississippi.

Respectfully submitted, this the 17th day of July, 2009.

Steven L. Lacey

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STATEMENT REGARDING ORAL ARGUMENT

The dispositive issues in this case were recently decided by this Court in Cause No. 2007-IA-00621-SCT. Therefore, the Appellees do not believe oral argument will be helpful or necessary for the Court.

STATEMENT OF THE CASE

This case arises out of an automobile accident that occurred on August 26, 2004. Plaintiffs sent a Mississippi Tort Claims Act ("hereinafter known as MTCA") Notice of Claim to the proper Executive Director of the Housing Authority of the City of Vicksburg (Mr. Jim Stirgus) on August 15, 2005 pursuant to Miss. Code Ann.§ 11-46-11. (RV 1 at p. 24)(RE 1). Plaintiffs then filed their cause of action on August 22, 2005 in the Warren County Circuit Court against Charles E. Bunton (a Housing Authority Employee) and the Housing Authority of the City of Vicksburg only seven (7) days after serving their Notice of Claim. (RV 1 at p. 6-10)(RE 2). Defendants moved to dismiss plaintiffs' claims based upon Plaintiffs' failure to comply with the MTCA ninety-day notice requirement and in the alternative the MTCA statute of limitations. The Trial Court denied the Defendants' Motion to Dismiss, as a result, Defendants were granted an interlocutory appeal with this Court.

On September 25, 2009, this Court sitting *En Banc* ruled that based upon the Plaintiffs' failure to comply with the MTCA ninety-day notice requirement the Circuit Court never had jurisdiction over the original complaint. (RV. 4 at p. 489-495) (RE 4). Pursuant to this Court's mandate, the Circuit Court entered an order dismissing Plaintiffs' cause of action on October 1, 2008. On October 30, 2008, Plaintiffs appealed the Circuit Court's mandated dismissal of their lawsuit. (RV 4 at p. 496-497). (RE 3).

In addition to this appeal, the Plaintiffs filed a new cause of action, Civil Action No. 08, 0131-CI, on October 2, 2008, which is currently pending in the Circuit Court of Warren County (although stayed pending the outcome of this appeal) based upon the same set of facts and circumstances naming only Charles E. Bunton, III and the Housing Authority of the City of Vicksburg.

STATEMENT OF THE FACTS

It is undisputed by the parties that the automobile accident in question occurred on August 26, 2004. It undisputed that Plaintiffs sent a Mississippi Tort Claims Act Notice of Claim to the proper Executive Director of the Housing Authority of the City of Vicksburg (Mr. Jim Stirgus) on August 15, 2005. (RV 1 at p. 26-29)(RE 1). It is undisputed that Plaintiffs' MTCA Notice of Claim states as follows: "The claim is based on injuries he received as a direct result of a collision with a government vehicle." (RV 1 at p. 26-29)(RE 1). It is also undisputed that Plaintiffs filed their cause of action only seven (7) days after serving their Notice of Claim on August 22, 2005. (RV 1 at p. 6-10)(RE 2). It is also undisputed that in discovery these Defendants produced the purchase agreement and certificate of title application showing that the Housing Authority of the City of Vicksburg bought and owned the vehicle in question. (Hearing transcripts at p. 64:15-29 & 65:1-20; 77:23-29 & 78:1-11). Additionally, it is undisputed that the Trial Court took these documents into consideration when making his ruling that MHARM was not a proper party to this lawsuit. (Hearing transcripts at p. 79: 1-10).

Furthermore, it is undisputed that Plaintiffs represented to this Supreme Court that the Mississippi Housing Authority Risk Management (MHARM) was mistakenly sued and that after some discovery it was conclusively established that Bunton was not an employee of MHARM. (*See* Appendix A to this Brief). Finally, it is undisputed that this Court previously ruled that due to the Plaintiffs' failure to properly comply with the MTCA, the Circuit Court never obtained subject-matter jurisdiction over the original complaint in Civil Action No. 05, 0271. (RV 4 at pp. 489-495) *Bunton v. King*, 995 So.2d 694 (Miss. 2008). (RE 4).

SUMMARY OF THE ARGUMENT

I.

Plaintiffs Admission to this Supreme Court That the Mississippi Housing Authority Risk Management Was Mistakenly Sued and That it Was Conclusively Established That Bunton Was Not an Employee of MHARM Is Fatal to Their Assignment of Error

Plaintiffs represented to this Supreme Court that the Mississippi Housing Authority Risk Management (MHARM) was mistakenly sued and that after some discovery it was conclusively established that Bunton was not an employee of MHARM. (*See* Appendix A to this Brief). Thus, Plaintiffs' assignments of error as they relate to the Circuit Court's order setting aside the entry of default and the dismissal of MHARM are without merit since MHARM did not employ Bunton or own the vehicle in question. (RV 1 at pp. 131-149) (RE 5). Therefore, Plaintiffs should be judicially estopped from making contrary factual arguments to this Court.

II.

On September 25, 2009, this Court sitting *En Banc* determined that the trial judge erred by denying Defendants' Motion to Dismiss. More importantly this Court ruled that due to the Plaintiffs' failure to properly comply with the MTCA, the Circuit Court never obtained subject-matter jurisdiction over Plaintiffs' original complaint, Civil Action No. 05, 0271. (RV 4 at pp. 489-495). *Bunton v. King*, 995 So.2d 694 (Miss. 2008). (RE 4). Thus, Plaintiffs' original compliant is a nullity. When an appellate court issues a ruling and sends the case back on remand, the ruling is the law of the case. *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 812 So.2d 953, 960. (Miss.2002). Therefore, Plaintiffs assignments of error as they relate to the Mississippi Tort Claims Act and its application to the Housing Authority of the City of Vicksburg and it employee Charles E. Bunton are also without merit.

ARGUMENT

I. Mississippi Housing Authority Risk Management, Inc., Was Properly Dismissed

In response to discovery requests from the Plaintiffs, MHARM and the Housing Authority of the City of Vicksburg produced the purchase agreement and certificate of title application showing that the Housing Authority of the City of Vicksburg bought and owned the vehicle in question and not MHARM. (Hearing transcripts at p. 64:15-29 & 65:1-20; 77:23-29 & 78:1-11). Plaintiffs do not dispute that they are in possession of these documents that definitively prove that MHARM did not buy or own the vehicle in question. Moreover, it is not disputed that these documents were considered by the Trial Court before the Court ruled that MHARM was not a proper party to the lawsuit. (Hearing transcripts at p. 79: 1-10). In addition, these Defendants submitted sworn affidavits admitting the Bunton was an employee of the Housing Authority and not MHARM in support of MHARM's motion to set aside the Circuit Clerks Entry of Default. (RV 1 at pp. 131-149). (RE 5).Thus, despite Plaintiffs' "lack of discovery" argument, discovery conclusively established that Bunton was not an employee of MHARM.

Ironically, In Response to Defendants' Interlocutory Appeal Plaintiffs Conceded That Bunton Was Not an Employee of MHARM

The initial interlocutory appeal was from the Trial Judge's denial of Defendant's Motion to Dismiss pursuant to the MTCA's ninety-day rule. Essential to this Court's prior holding is Plaintiffs' admission that after some discovery it was learned conclusively that Bunton was not a MHARM employee. (*See* Appendix A to this Brief). Plaintiffs' concession allowed this Court to properly apply the MTCA to Plaintiffs improperly filed complaint against the Housing Authority of the City of Vicksburg and Bunton. (RV 4 at pp. 489-495). *Bunton v. King*, 995 So.2d 694 (Miss. 2008). (RE 5). As a result, the Trial Court properly dismissed MHARM.

II. Plaintiffs Assertion That MTCA Defenses Should Not Be Applied to this Case Is Also Without Merit.

On September 25, 2009, this Court sitting *En Banc* determined that the trial judge erred by denying Defendants' Motion to Dismiss. *Bunton v. King*, 995 So.2d 694 (Miss. 2008) (RE 4). More importantly this Court ruled that due to the Plaintiffs' failure to properly comply with the MTCA, the Circuit Court never obtained subject-matter jurisdiction over Plaintiffs' original complaint, Civil Action No. 05, 0271. (RV 4 at pp. 489-495). (RE 4). As a result, the Defendants MTCA defenses have already been accepted by this Court. *Id.* Furthermore, the reach of this Court's decision in the interlocutory appeal is central to the disputes now asserted in this second appeal.

When an appellate court considers a second appeal in a case that it previously reviewed, its prior holdings usually are not to be changed. *Florida Gas Exploration Co. v. Searcy,* 385 So.2d 1293, 1295 (Miss.1980), quoting *Mississippi College v. May,* 241 Miss. 359, 366, 128 So.2d 557 (1961). The law of the case is similar to res judicata but is restricted to questions of law only. *Cont'l Turpentine & Rosin Co. v. Gulf Naval Stores Co.,* 244 Miss. 465, 479-80, 142 So.2d 200, 206-07 (1962). When an appellate court issues a ruling and sends the case back on remand, the ruling is the law of the case. *Moeller v. Am. Guarantee & Liab. Ins. Co.,* 812 So.2d 953, 960. (Miss.2002). Therefore, this Court's prior ruling that the Circuit Court never obtained jurisdiction over Plaintiffs' original complaint is the law of the case. (RV 4 at pp. 489-495). *Bunton v. King*, 995 So.2d 694 (Miss. 2008) (RE 4).

Plaintiffs Failed to Establish That the Housing Authority or Any of its Agents Made a Misrepresentation Regarding the Running of the Statute of Limitations or That They Need Not Comply with the MTCA.

Out of an abundance of caution these Defendants will entertain Plaintiffs' estoppel argument. Plaintiffs argument on this issue is rather strained. "Equitable estoppel requires a representation by

a party, reliance by the other party, and a change in position by the relying party." *Patrick v. Shields*, 912 So.2d 1114. (Miss. App., 2005.) (Citing, *Westbrook v. City of Jackson*, 665 So.2d 833, 839 (Miss.1995) (citing *Izard v. Mikell*, 173 Miss. 770, 163 So. 498, 499 (1935)). "Inequitable or fraudulent conduct must be established to apply the doctrine of equitable estoppel to a statute of limitations." *Trosclair v. Miss. Dep't. of Transp.*, 757 So.2d 178, 181(11) (Miss.2000) (citing *Mississippi Dep't. of Pub. Safety v. Stringer*, 748 So.2d 662, 665(11) (Miss.1999)).

Plaintiffs rely on *Trosclair*, arguing that the police report in this case states that MHARM was the owner of the truck and was thus a misrepresentation by Defendant Bunton. The facts in the present case are much different from the facts in *Trosclair*. In *Trosclair*, the circuit court awarded summary judgment in favor of the Mississippi Department of Transportation (MDOT) after determining the notice requirements of the MTCA had not been met. *Id.* Susan Trosclair and Bridget Bailes were injured when their car left the roadway on U.S. Highway 49, which was under construction at the time of the accident. *Id.* at 179(2). When their attorney contacted MDOT he was informed that the construction was being done by a private contractor. *Id.* Approximately fourteen months after the accident and after an investigation was concluded, the attorney learned that MDOT had performed the renovations to the roadway. *Id.* Even though the one year statute of limitations had expired on their claim, Trosclair and Bailes filed suit against MDOT. *Id.* The circuit court granted MDOT's motion to dismiss stating that Trosclair and Bailes failed to comply with the MTCA notice requirements. *Id.* at 180(¶ 5). On appeal, the Supreme Court determined that there was a material issue of fact as to whether Trosclair and Bailes reasonably relied on the misrepresentation of MDOT. *Id.* at 181(¶ 13). Therefore, the Supreme Court reversed the grant of summary judgment in favor of MDOT and remanded the case to the circuit court. *Id.*

In the present case, Plaintiffs have failed to establish that the Housing Authority or any of

its agents mislead them or made a misrepresentation regarding the running of the statute of limitations or that they need not comply with the MTCA. In fact, Plaintiffs have not established any fraudulent conduct, or that any Defendant prevented Plaintiffs from filing their complaint on time. There is no evidence from the record that any Defendant in this case intentionally prevented Plaintiffs from filing their claims before the statute of limitations expired. There are certain situations where a defendant's actions may be such that estop the defendant from being protected by the statute of limitations. However, equitable estoppel should not be applied so liberally as to allow a plaintiff to assert estoppel where no fraudulent or inequitable behavior is present. *Stringer*, 748 So.2d at 665(13).

Why Plaintiffs Chose to Serve James Stirgus the Executive Director of the Housing Authority A Notice of Claim but Not the Complaint Remains Unknown

The accident happened on August 26, 2004, and after sending a MTCA Notice of Claim to the Executive Director of the Housing Authority, James Stirgus, Plaintiffs filed their August 22, 2005, Complaint in violation of the MTCA notice provisions. *Bunton v. King*, 995 So.2d 694 (Miss. 2008). (RE 4). Absolutely nothing prevented Plaintiffs from timely serving a Notice of Claim or from filing a Complaint against the Housing Authority of the City of Vicksburg. In fact, the Notice of Claim sent to the Executive Director of the Housing Authority (Mr. Jim Stirgus) clearly establishes that prior to filing suit, there was no doubt that the Kings and the Kings' counsel thoroughly understood that they were suing a government entity and one of its employees.

The August 15, 2005, Notice of Claim

In particular, the August 15, 2005, Notice of Claim signed by Plaintiffs' counsel specifically states: "This letter is to serve as a notice of claim for injuries resulting from the tortious conduct of a **government entity or its employee** as provided for in § 11-46-11 Miss. Code Ann. (1972), as

amended." and that "[t]he claim is based on injuries he received as the direct result of a collision with **a government vehicle**." (RV 1 at p. 26-29) (RE 1)(Emphasis added). As such, Plaintiffs' continued assertion that they were confused and believed that MHARM was Bunton's employer is a red herring. Certainly Plaintiffs' belief that MHARM might be the employer did not stop them from serving the Complaint on Bunton.

Why Plaintiffs chose to serve the executive director of the housing authority a Notice of Claim but not the Complaint remains unknown to this date. "Though statutes of limitation may sometimes have harsh effects, it is not the responsibility of the government entity, nor any other potential defendant, to inform adverse claimants that they must comply with the law." *Stringer*, 748 So.2d at 667. Once again Plaintiffs' previous representation to this Court is telling wherein it states that "the Kings were always aware that a 'housing authority' of some description was a defendant." (*See* Appendix A to this Brief). Since there is no evidence that the Housing Authority of the City of Vicksburg misled Plaintiffs, they are not estopped from relying on MTCA defenses already accepted by this Court.

III. The Trial Court Did Not Err Setting Aside the Clerk's Entry of Default

The standard of review for setting aside a trial court determination is whether the trial court committed an abuse of discretion. "The question whether a trial court ought to vacate a judgment entered by default is addressed to the sound discretion of the trial court." *Bailey v. Georgia Cotton Goods Company.* 543 So.2d 180, 181 (Miss. 1989). Regardless of the result of the trial judge's determination, this Court must only look to whether there was an abuse of discretion. If this Court finds no abuse of discretion, there is no other choice but to let the decision stand. In *Leach v. Shelter Insurance Company and Roebuck,* 909 So.2d 1283, (Miss. App.2005), the Mississippi Court of Appeals upheld the trial judge's decision finding "at the very least, we cannot say the trial judge

abused his discretion." "Where the trial court has denied a motion to vacate, we will reverse only where that court has abused its discretion." *Bailey v. Georgia Cotton Goods Company,* 543 So.2d at 182.

The Trial Court was soundly within its discretion to determine that the Entry for Default Judgment should be vacated and, therefore, the Plaintiffs assertion that the Court abused its discretion is misguided. Mississippi common law is ripe with cases in which the Court determined that when the trial court committed no error of law nor abuse of discretion, they have no choice but to affirm. "We will not reverse unless convinced that the Circuit Court has abused its discretion in the premises." *H & W Transfer and Cartage Service. Inc. v. Griffin,* 511 So.2d 895 (Miss. 1987).

The Court Did Not Err Setting Aside Bunton's Entry of Default

As outlined above, this Court already ruled that Plaintiffs' failed to comply with the MTCA, and therefore, the Circuit Court never obtained subject-matter jurisdiction over Plaintiffs' original Complaint, Civil Action No. 05, 0271. (RV 4 at pp. 489-495). (RE 4). Moreover, Defendant Bunton, a Housing Authority of the City of Vicksburg employee could not be held personally liable pursuant to Miss. Code Ann. §11-46-7(2). Although, Plaintiffs served Bunton they did not properly serve the August 22, 2005, Complaint on any person, officer, group or body responsible for the administration of the Housing Authority of the City of Vicksburg on or before December 20, 2005, or within one hundred twenty days after filing their Complaint pursuant to M.R.C.P. 4(d)(8).

Furthermore, Defendant Bunton filed a responsive pleading asserting all affirmative defenses on April 19, 2006. On May 1, 2006, Plaintiffs filed a response to Bunton's Motion and at the same time an application for entry of default. (RV1 at p. 17-37). As a result, Defendant Bunton had tendered a defense prior to Plaintiffs' application for a Clerk's Entry of Default. *Id.* More importantly, Plaintiffs' counsel admitted during oral argument that (Bunton) employees of

government agencies "can't be held liable" pursuant to the MTCA. (Hearing transcript at p. 36:10-16 & 37:10-15). (RE 6). Based upon Plaintiffs' counsel's admission that Bunton could not be held personally liable, the fact that the Plaintiffs had not properly served the Housing Authority pursuant to Rule 4(d)(8), and that Plaintiffs failed to comply with the MTCA resulting in the Circuit Court not having jurisdiction over this cause of action, there remains no legitimate argument that the Trial Court erred in vacating the docket entry of default.

The Court Did Not Err Setting Aside MHARM's Entry of Default

As a starting point, the Court should recall that Plaintiffs represented to this Supreme Court that MHARM was mistakenly sued and that after some discovery it was conclusively established that Bunton was not an employee of MHARM. (*See* Appendix A to this Brief). Moreover, in response to Plaintiffs' application for an entry of default MHARM provided a defense that was not only meritorious, it was absolute. As outlined above this case arises out of an automobile accident in which a vehicle allegedly being driven by co-defendant Charles Bunton, an employee of the Housing Authority of the City of Vicksburg, had an accident with the Plaintiffs. As is clearly set forth in the affidavit of Executive Director James Sturgis and Thomas Robinson, the Plan Administrator of MHARM, Mr. Bunton was not and never had been employed by MHARM, and the vehicle being driven by Mr. Bunton on the day of the accident in question was not owned by MHARM. (RV 1 at p. 131-149). (RE 5). In the face of the affidavits providing sworn testimony that MHARM did not own the vehicle in question and Mr. Bunton was not and never had been an employee of MHARM, there remains no legitimate argument that the Trial Court erred in vacating the docket entry of default . In fact, there would of been a manifest injustice had the Court failed to set aside the docket entry of default against an improper party to the lawsuit. The Plaintiffs have failed to prove any abuse of discretion or error of law with regard to MHARM. The trial court heard

oral argument, looked at the evidence and reasonably determined that there was a valid reason for vacating the entry of default, and thus the Trial Court's ruling should be upheld.

CONCLUSION

Plaintiffs cannot in good faith dispute that they previously represented that MHARM was mistakenly sued and that after some discovery it was conclusively established that Bunton was not an employee of MHARM. Based upon the foregoing, the Trial Court did not err in setting aside the entry of default and dismissing MHARM. In addition, this Court sitting *En Banc* determined that because the Plaintiffs failed to properly comply with the MTCA, the Circuit Court never obtained subject-matter jurisdiction over Plaintiffs' original Complaint.

Furthermore, contrary to Plaintiffs' argument, Plaintiffs' failure to wait the required ninety (90) days after serving their Notice of Claim on the Executive Director of the Housing Authority and file their lawsuit only seven (7) days later, can in no way be attributed to any acts or omissions of the Defendants. As a result, this Court's prior ruling stands and Plaintiffs' original Complaint is in effect a nullity.

Respectfully submitted this the 17th day of July, 2009.

CHARLES E. BUNTON III; and HOUSING AUTHORITY OF THE CITY OF VICKSBURG; MISSISSIPPI HOUSING AUTHORITY RISK MANAGEMENT INC.

BY: _____
Steven L. Lacey

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-IA-00621-SCT

CHARLES E. BUNTON, III, and HOUSING AUTHORITY OF THE CITY OF VICKSBURG — **APPELLANTS**

VS.

DARRELL KING AND MARY KING — **APPELLEES**

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

APPELLEES' BRIEF

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STATEMENT OF THE ISSUE

This case involves the Mississippi Tort Claims Act's requirement that "ninety (90) days prior to maintaining an action [on a claim against a political subdivision], such [claimant] shall file a notice of claim . . .." Miss. Code Ann. § 11-46-11(1). Two entities, Mississippi Housing Authorities Risk Management, Inc. ("MHARM"), and the City of Vicksburg's housing authority, were mistakenly sued. Only after the defendants' pleadings and some discovery was it learned conclusively that Bunton was not a City or MHARM employee and that the "Housing Authority of the City of Vicksburg" was not a branch of municipal government.

The trial court allowed the complaint to be amended to name the correctly-identified HAV as an independent political entity. Under the peculiar circumstances of this case, the issue is whether HAV's having actual written notice of the claim for far more than ninety days prior to its joinder under Rule 15 is sufficient compliance with the MTCA's requirement that the claimant provide written notice at least ninety days prior to "maintaining an action" against the public defendant.

STATEMENT OF THE CASE

With respect for counsel's effort, the Kings must reject the Appellants' statement of the case as confusing and repetitive. This case arose from a motor vehicle accident that occurred on August 26, 2004. (V. 1: C.P. 7) The Kings were passengers in a vehicle that was rear-ended by a truck driven by Charles Bunton.

identity of the two physicians. *Womble*, 618 So.2d at 1268.

The federal courts of appeals are split on the question of whether ignorance of a potential defendant is a "mistake" within the meaning of Rule 15, Fed.R.Civ.P. See, *Arthur v. Maersk, Inc.*, 434 F.3d 196, 208 (3rd Cir. 2006)(holding that ignorance of existence of potential defendant is "mistake" and collecting cases). However, in this case the Kings were always aware that a "housing authority" of some description was a defendant.

As the Third Circuit said in *Arthur*, "A 'mistake' is no less a 'mistake' when it flows from lack of knowledge as opposed to inaccurate description. See Webster's Third New International Dictionary 1446 (1981) (defining 'mistake as 'a wrong . . . statement proceeding from faulty judgment, inadequate knowledge, or inattention')." As did the *Arthur* Court, Mississippi's appellate courts refer to standard dictionary sources to determine the plain meaning of language whether the words are contained in private law such as contracts, or public law such as ordinances and statutes. *Anglin v. Gulf Guaranty Life Ins. Co.*, 956 So.2d 853, ¶ 15 (Miss. 2007).

Not knowing which entity was a proper party, or whether the entity was a municipal agency, is the kind of "mistake" that, as here, normally gets worked out in the pleadings and discovery. The trial court's order allowing the complaint to be amended is an example of the kind of "leeway" referred to by the *Ralph Walker* court. The policy underlying the rule is that a meritorious claim should not be lost because of mistake or inadvertence that causes no prejudice to the party to be