

NO.2009-CA-00066

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

CASEY LEE DAVIS

Appellant

v.

IMPERIAL PALACE OF MISSISSIPPI, LLC

Appellee

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CIVIL ACTION NO. A2402-07-88

BRIEF FOR APPELLANT

Thomas E. Payne


280 Rue Petit Bois

Biloxi, MS 39531

Telephone: (228)388-0007

ORAL ARGUMENT IS NOT REQUESTED.

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

NO.2009-CA-00066

CASEY LEE DAVIS

APPELLANT

VERSUS

IMPERIAL PALACE OF MISSISSIPPI, LLC

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi rules of Appellate Procedure, 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.

Thomas E. Payne

Attorney of record for Casey Lee Davis

Casey Lee Davis

Appellant

Ronald G. Peresich, Jr.

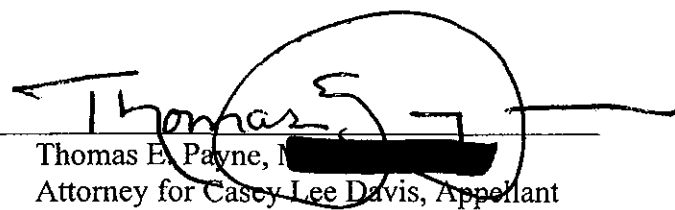
Attorney of record for Imperial Palace of Mississippi, LLC

Imperial Palace of Mississippi, LLC

Appellee

This the 15th day of July, 2009.

BY: _____


Thomas E. Payne, I
Attorney for Casey Lee Davis, Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Casey Lee Davis, believes that the issue or issues have been authoritatively decided and that the facts and legal arguments are adequately presented in the Appellant's Brief and the Record; however, the Appellant would be pleased to participate in oral argument should the Court deem it necessary.

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LEGEND

T.T.	=	Trial Transcript
R.E.	=	Record Excerpt
R.	=	Record

Statement of the Issue

The lower Court abused its discretion in not allowing an out of time appeal. The Court failed to address the legal grounds presented by the Appellant's counsel in his argument. The Court did not examine the grounds for excusable neglect from a notice and medical emergency standard.

Statement of the Case

A. Course of the Proceedings and Disposition in the Court Below

B. Statement of the Facts

A lawsuit was filed against Imperial Palace of Mississippi, LLC on March 16, 2007. Discovery was propounded and answered by both parties, and the Imperial Palace of Mississippi, LLC submitted a Motion for Summary Judgment on August 7, 2007. Casey Davis's Response to the Motion for Summary Judgment was filed on October 11, 2007, and the Imperial Palace of Mississippi, LLC submitted a Rebuttal on October 12, 2007. A Judgment was issued by Judge Stephen Simpson on December 27, 2006, granting summary judgment to Imperial Palace of Mississippi, LLC. Judge Simpson left the bench and was appointed to the Commission of Public Safety, and Judge Lawrence Bourgeois was appointed as his replacement.

A Notice of Appeal was filed by Casey Davis on January 30, 2008. This filing was past the thirty (30) days allocated in the Mississippi Rules of Appellate Procedure Rule 4(a), and a Motion to Re-Open Appeal Time was filed by Casey Davis on February 6, 2008. The IP filed its Response to the Motion to Re-Open on March 5, 2008. On December 30, 2008, Judge Lawrence Bourgeois issued an Order that denied Casey Davis's Motion to Re-Open Appeal Time. A Notice of Appeal of Judge Bourgeois's Order was filed on January 9, 2009.

Summary of the Argument

In denying Casey Davis's motion for an out of time filing, the Circuit Court judge did not take into consideration the severe illnesses affecting the paralegal of the legal counsel representing Casey Davis.

Plaintiff's counsel asserts his failure to timely file a notice of appeal was due to secretarial problems. However, "preoccupation of counsel with other matters does not dispense with the necessity for compliance with the rules." *Ware v. Capers*, 573 So.2d 773, 775 (Miss. 1990)(citing *United States v. Bowen*, 310 F.2d 45 (5th Cir. 1962)). This Court does not find good cause or excusable neglect for Plaintiff's failure to file a timely notice of appeal. Thus, Plaintiff's motion to reopen appeal time should be denied. (R.E. 02 Order December 30, 2008).

The Casey Davis out of time filing was argued on the basis of secretarial illness, but the out of time appeal was denied on the basis of *Ware v. Capers* 573 So. 2d 773, 776 (Miss. 1990) which was decided on the factual basis of the attorney's failure to advise his client of the court's entry of judgment.

The out of time filing should be allowed because of excusable neglect. The paralegal in charge of handling this case suffered a series of strokes, and her mental capacities were impaired. This issue was brought to light in the hearing before Judge Bourgeois, and he based his ruling upon a case that did not stand on point with the facts of the Casey Davis case.

Rule 4(g) Extension is in place to allow an additional thirty days in exceptional circumstances. The exceptional circumstances in this case are that Appellant's counsel was under the impression that the Notice of Appeal was being prepared and would be timely filed. Unfortunately, his paralegal's illness precluded her from completing this task.

The paralegal had been having serious medical conditions which ultimately culminated in a series of strokes. During the thirty day time period allowed for filing the Notice of Appeal, the paralegal assured Appellant's counsel that the Notice of Appeal would be filed within the allotted time frame. However, unbeknown to Appellant's counsel, her health continued to

decline. She suffered from migraine headaches which contributed to a series of strokes. During this time, Appellant's counsel was under the impression that his filings were being handled in a timely manner.

When Appellant's counsel discovered that the notice of appeal had not been filed within the thirty day time frame, he immediately had the notice of appeal filed. This was four days past the filing deadline.

Argument

The Circuit Court improperly denied the motion for an out of time filing because it did not address the argument that the out of time filing was due to excusable neglect on the basis of secretarial incapacity due to severe illness.

A. Standard of Review

The Standard of Review is Abuse of Discretion is established in *Ware v. Capers*, 573 So. 2d 773, 776 (Miss. 1990). See *Vianello v. Pacifico*, 905 F.2d 699, 700 (3d Cir.1990). The Supreme Court of Mississippi held that, "To the degree that a trial judge's decision to grant or deny a motion for an extension of time is based upon precept of law, the standard for this Court's review shall be "plenary"; otherwise, this Court shall simply apply the abuse-of-discretion standard."

B. Applicable Rule

Rule 4(g) of the Mississippi Rules of Appellate Procedure provides a means to rectify the untimely filing of a notice of appeal. Rule 4(g) Extension states:

The trial court may extend the time for filing a notice of appeal upon motion filed not later 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such

prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

C. Consideration of the Issue Below

The Lower Court had an obligation to review all of the components that contributed to the late filing of the Notice of Appeal and base its Order on the sum of those components. However, in the Order of December 30, 2008, the chancellor based his decision upon “secretarial problems” which he then equated to, “preoccupation of counsel with other matters...” *Ware v. Capers*, 573 So. 2d 773, 776 (Miss. 1990) (citing *United States v. Bowen*, 310 F.2d 45 (5th Cir. 1962)). The illness of the paralegal was more than a “secretarial problem” and the chancellor did not fully consider the ramifications of her illness.

Appellant's attorney specifically stated, “This is not a case, Your Honor, where we were overworked. We weren't overworked. It's not a case of benign neglect on the part of an attorney... (R.E. 01 TR Pg 7 Ln 25-28) It was a case where I was paying attention to what was going on. I was relying on my paralegal, and she was medically unable to do what she was supposed to be able to do.” (R.E. 01 TR Pg 8 Ln 2-7). “The bottom line was that she had been having what, for lack of better terms, were TIAs prior to the – and the doctor noted that these were usual for individuals who were building up to strokes.” (R.E. 01 TR Pg 6 Ln 20-24).

The Lower Court judge, in his Order of December 30, 2008, abused his discretion because he did not address the medical issues that contributed to the inability of the paralegal to perform her work. “In order for this Court to say that the chancellor has abused his discretion, there must be insufficient evidence to support his conclusions. *Tucker*, 452 20.2d at 1296-97 in the case *Mabus v. Mabus*, 910 So.2d 486 Miss, 2005. The Lower Court dismissed the argument of the Appellant's counsel on the basis of, “preoccupation of counsel with other matters...” Additionally, in the *Mabus v. Mabus* case at 493, Justice Carlson stated that, “While we defer to a chancellor's discretion, a discretionary determination must be supported by factual findings.”

The Lower Court stated that, "Plaintiff's counsel asserts his failure to timely file a notice of appeal was due to secretarial problems." (R.E. 02 Order December 30, 2008). The encompassing medical issues of the paralegal were not addressed in the *Order* of December 30, 2008.

The factors for determining excusable neglect according to *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 1496-1500, 123 L.Ed2d 74 (1993) are: (1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect.

1. Whether granting the delay will prejudice the debtor

As to the issue of prejudice when reopening the time for notice of appeal, the extension of time would not prejudice the Imperial Palace of Mississippi, LLC. According to Imperial Palace of Mississippi's *Response to Motion to Reopen Time for Appeal* paragraph 8 states:

At the expiration of the thirty-day period following entry of this Court's Order, Imperial Palace was entitled to rely on the judgment entered by this Court that the matter was finally dismissed and that because no appeal had been timely taken, no subsequent efforts at appeal could thereafter be brought.

The only objection that deals with prejudice is that Imperial Palace of Mississippi, LLC was entitled to rely on the judgment entered by the Court. The question of prejudice is addressed in *Horowitz v. Parker*, 852 So. 2d 686 (Miss. Ct. App. 2003) when the Mississippi Court of Appeals states, "In *Horowitz*, we found that prejudice must entail more than simply the chance of reversal and a subsequent loss of any benefit gained by virtue of the initial judgment." Other than stating that it was entitled to rely on the judgment, the Imperial Palace of Mississippi, LLC made no claim that it had proceeded to act on the judgment and that the court's actions would be detrimental to the Imperial Palace of Mississippi, LLC if the out of time filing were allowed.

The standard of review as it pertains to prejudice in filing an out of time appeal is found in *Flowers v. State*, 805 So. 2d 654, 656 (¶4) (Miss Ct. App. 2002) (quoting *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 47 (¶4) (Miss. 1998)) which states that:

Where the trial court failed to make any specific findings of fact, this Court will assume that the issue was decided consistent with the judgment and these findings will not be disturbed on appeal unless manifestly wrong or clearly erroneous. The reviewing court must examine the entire record and must accept, “that evidence which supports or reasonable tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court’s findings of fact.” That there may be other evidence to the contrary is irrelevant.

The Imperial Palace of Mississippi, LLC made no contentions that it proceeded to conduct business that would be adversely affected by the out of time filing.

2. The length of the delay and its impact on efficient court administration

The length of the delay was four days after the expiration of the appeal deadline, and of the four days, two days were comprised of a weekend. The granting of the out of time filing will have a minimal effect on efficient court administration. Casey Davis is entitled to a hearing on the merits of her case, and allowing the out of time notice of appeal to be filed may give her the opportunity to have the appeal of her case heard. The impact that it will have on an efficient court administration is that her case will be reviewed by the Supreme Court of Mississippi who will determine whether or not to allow her appeal.

3. Whether the delay was beyond the reasonable control of the person whose duty it was to perform

It was the duty of the paralegal to perform the task that was assigned to her. Davis’s attorney is responsible for the tasks given to his employees. However, it was beyond the scope of his ability to know of the medical impairment suffered by his paralegal unless she specifically told him of her medical condition. Inasmuch as she was unaware of the seriousness and extent of the condition, neither she nor Davis’s attorney was able to perform the diligence required to

accomplish a timely filing of the notice of appeal. Davis's attorney was under the impression that the appeal would be timely filed, and the paralegal was unable to disclose to him the severity of her affliction. It was only after her strokes were diagnosed that the reason for her inability to complete her assignment became evident.

4. Whether the creditor acted in good faith

The attorney acted to have the notice of appeal filed as soon as he became aware of the circumstances. The notice of appeal was filed four days past the deadline, and two of the days were a weekend. He had been repeatedly assured that the filing would be handled in a timely manner, and he acted accordingly. When he became aware that the deadline had passed, he immediately acted to file the notice of appeal together with a Motion to Allow the Out of Time Filing.

5. Whether clients should be penalized for their counsel's mistake or neglect

According to Rule 4 Comments of the Mississippi Rules of Appellate Procedure, "...the burden rests on the appellant to show the failure to file a timely notice was a result of 'excusable neglect.'" Casey Davis and her attorney believed that the notice of appeal would be timely filed. The Circuit Court denied the out of time filing on the basis of *Ware v. Capers*, 573 So.2d 773, 775 (1990), stating that, "preoccupation of counsel with other matters does not dispense with the necessity for compliance with the rules." However, this case is appealed on the basis of the extenuating medical circumstances affecting the paralegal in charge of handling the filing of the notice of appeal and, "preoccupation of counsel with other matters does not dispense with the necessity for compliance with the rules," does not address the issue at hand.

The paralegal who suffered the debilitating mini-strokes did not remember to timely file the Notice of Appeal. Other states have allowed excusable neglect on the basis of secretarial oversight. The Third District Court of Appeal, State of Florida filed an opinion in the case of *In*

Re: Estate of William R. Cummins, Deceased, Fla. 3C DCA (2008) the court held that, “The standard of review for excusable neglect is abuse of discretion.” *Boudot v. Boudot*, 925 So. 2D 409, 415 (2006) (citing *Smith v. Smith*, 902 So. 2D 859, 861 (2005)). In the Cummins case an enlargement of time of twelve days was permitted because of secretarial oversight. The Cummins case is similar to the case at hand in that in both cases the attorneys were under the impression that the filings were being properly filed.

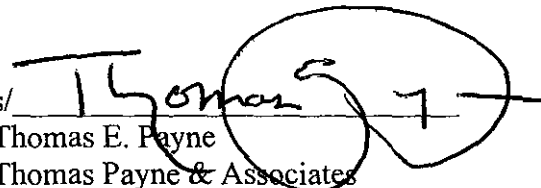
The filing of an out of time appeal is also addressed in *Fallen v. United States*, 84 S.Ct. 1689 (1964). The issue in the case of *Fallen* was whether or not to allow an out of time filing when a prisoner had done everything within his means insure the timeliness of the filing. The Supreme Court ruled that, “Since petitioner did all that he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits.” The United States Supreme Court allowed this out of time filing after a determination that the petitioner had exercised diligence, and the filing was late because of circumstances beyond his control. Likewise, in the case of Casey Davis the attorney displayed diligence by questioning his paralegal as to the status of the appeal. Although she was reminded to file the notice of appeal, she was unable to complete the task because her medical conditions impaired her thought processes. The paralegal was not aware of the exact nature of her illness, and she was not able convey to Appellant's counsel the complexity of her medical condition. It was only after she suffered her strokes that the manner in which this impairment had affected her work product became known.

Conclusion

Casey Davis seeks to have an Order from this court allowing the out of time appeal on the basis that the lower court did not address the issue presented in the Motion Hearing of

November 20, 2008. She also requests that all costs of this appeal, including attorney's fees, be taxed against the Imperial Palace of Mississippi, LLC.

Respectfully submitted,
Casey Lee Davis

s/ 
Thomas E. Payne
Thomas Payne & Associates
280 Rue Petit Bois
Biloxi, MS 39531

CERTIFICATE OF SERVICE

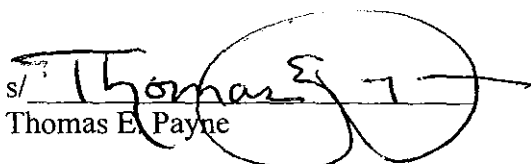
I, Thomas E. Payne, attorney for appellant, Casey Lee Davis, certify that I have this day filed this Brief of the Appellant with the clerk of this Court and have served a copy of this Brief of the Appellant by United States mail with postage prepaid on the following persons at these addresses:

Betty Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205
(601)359-2407

Gayle Parker, Circuit Court Clerk
P.O. Box 235
Biloxi, MS 39533

Ronald G. Peresich, Jr.,
Mannino, Peresich & McDermott, PLLC
P.O. Drawer 289
Biloxi, MS 39533
Fax # 228-432-5539

This the 15th day of July, 2009.

s/ 
Thomas E. Payne