IN THE MISSISSIPPI SUPREME COURT

NO. 2011-CA-00108

LLOYD WAYNE CUEVAS AND WIFE
CHARLOTTE ANGELL CUEVAS — APPELLANTS

V.

FRANCES J. MCARTHUR, WESTERN
SURETY COMPANY, AND JULIEN BYRNE, III,
ANGELA K. LADNER, AND KELLY C. SMITH — APPELLEES

BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

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V.

FRANCES J. MCARTHUR, WESTERN SURETY COMPANY, AND JULIEN BYRNE, III, ANGELA K. LADNER, AND KELLY C. SMITH — **APPELLEES**

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.

1. Lloyd Wayne Cuevas and Charlotte Angell Cuevas, Appellants.
2. Angela K. Ladner and Kelly C. Smith, Appellees.
3. Honorable Eugene L. Fair, Jr., Chancellor.
4. Michele D. Biegel, Attorney for Appellants.
5. B. Ruth Johnson, Attorney for Appellants.
6. James C. Simpson, Jr., Attorney for Appellees.

Michele D. Biegel

MICHELE D. BIEGEL (MSB [redacted])
Attorney of Record for Appellants

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

CASES **Page**

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the Case

Lloyd Wayne Cuevas ("Wayne") and his wife Charlotte Angell Cuevas (collectively referred to as "the Cuevases") filed suit in the Chancery Court of the First Judicial District of Harrison County, Mississippi, to cancel a quitclaim deed of record that Wayne did not sign nor did he authorize anyone to sign. (R. 1). Said deed conveys land from Wayne to two of his daughters, Angela K. Ladner ("Ladner") and Kelly C. Smith ("Smith"). (R. 2).

The Cuevases also named as defendants Frances J. McArthur ("McArthur"), the notary that allegedly witnessed Wayne's signature on said deed; Western Surety Company ("Western"), McArthur's bonding company; and Julien Byrne, III ("Byrne"), the attorney that prepared said deed. All claims against McArthur, Western, and Byrne were settled and dismissed prior to trial. (R. 2).

Following entry of the trial court's *Opinion and Final Judgment* denying the Cuevases' request to cancel the quitclaim deed of record, the Cuevases timely filed a post-trial Motion pursuant to *MRCP* 52 and *MRCP* 59. (R. 8, 36). The Chancellor entered an *Order* denying the post-trial Motion (R. 36), however, the Cuevases first notice that this *Order* existed was more than thirty (30) days following entry. The day that the Cuevases learned of the *Order* through their attorney they immediately prepared and served a Motion requesting that the trial court reopen their time to appeal. (R. 38). Again, the Chancellor denied the Cuevases' request for

relief (R. 50), and it is this ruling that the Cuevases are appealing.

Course of the Proceedings

On September 23, 2010, the *Opinion and Final Judgment* ("Judgment") of the trial court was entered. (R. 1-7).

On October 4, 2010, the Cuevases timely filed their *Motion to Alter or Amend Findings, Conclusions and Final Judgment or, in the Alternative, Grant a New Trial* ("post-trial Motion"). (R. 8-27).

On November 1, 2010, an *Order* was entered denying the Cuevases' post-trial Motion. (R. 36-37).

On December 7, 2010, the day the Cuevases learned of the existence of the *Order*, they served their *Motion to Reopen Time for Appeal* ("Motion to Reopen") and mailed it to the clerk for filing; said Motion was filed on December 10, 2010. (R. 38-43)

On December 14, 2010, Ladner and Smith filed *Defendants' Kelly C. Smith and Angela K. Ladner's Opposition to Plaintiff's Motion to Reopen Time for Appeal* ("Opposition"). (R. 44-46).

On December 23, 2010, the Cuevases filed their *Notice of Hearing on Motion to Reopen Time for Appeal* noticing their Motion to Reopen for hearing on January 14, 2011. (R. 47-49).

On January 5, 2011, the trial court entered its *Order* denying the Cuevases' Motion to Reopen. (R. 50).

On January 19, 2011, the Cuevases timely filed their *Notice of Appeal* to appeal the trial court's January 5, 2011 *Order*. (R. 51-

52).

Statement of Facts

Lloyd Wayne Cuevas ("Wayne") and his wife Charlotte Angell Cuevas (collectively referred to as "the Cuevases") filed suit in the Chancery Court of the First Judicial District of Harrison County, Mississippi to cancel a quitclaim deed of record conveying land from Wayne to two of his daughters, Angela K. Ladner ("Ladner") and Kelly C. Smith ("Smith"). (R. 1-2). Wayne alleged and maintains that he did not sign said deed nor did he authorize anyone to sign his name. (R. 1-2).

The Cuevases also named as defendants Frances J. McArthur ("McArthur"), the notary that allegedly witnessed Wayne's signature on said deed; Western Surety Company ("Western"), McArthur's bonding company; and Julien Byrne, III ("Byrne"), the attorney that prepared said deed. (R. 2).

All claims against McArthur, Western, and Byrne were settled and dismissed prior to trial. (R. 2).

On September 23, 2010, the *Opinion and Final Judgment* of the Court was entered denying the Cuevases' request to cancel the quitclaim deed of record from Wayne to Ladner and Smith. (R. 1).

On October 4, 2010, the Cuevases timely filed their *Motion to Alter or Amend Findings, Conclusions and Final Judgment or, in the Alternative, Grant a New Trial* ("post-trial Motion"). (R. 8).

On November 1, 2010 the Court entered an *Order* denying the Cuevases' *Motion to Alter or Amend Findings, Conclusions and Final*

Judgment or, in the Alternative, Grant a New Trial (R. 36), however, the Cuevases did not receive notice of said *Order* until December 7, 2010. (R. 39).

On December 7, 2010 upon learning of said *Order*, the Cuevases served their *Motion to Reopen Time for Appeal* with the *Affidavit of Michele D. Biegel*, their lawyer, attached thereto as Exhibit "A" and incorporated by reference. (R. 38).

As stated in the *Affidavit of Michele D. Biegel*, counsel for the Cuevases, Michele D. Biegel, was notified of the entry of said *Order* from counsel opposite on December 7, 2010. (R. 42).

Also, as stated in the *Affidavit of Michele D. Biegel*, neither Biegel nor Biegel's office received notice of the *Order* from the clerk or any party within twenty one days of its entry (R. 41), but, in fact, only received notice of the *Order* on December 7, 2010. (R. 42).

The *Affidavit of Michele D. Biegel* clearly states that prior to December 7, 2010 neither Biegel nor her office received any type notice, written or oral, from anyone of the Court's ruling and subsequent *Order*. (R. 42).

Attached to the *Affidavit of Michele D. Biegel* as Exhibit "1" and incorporated by reference is a redacted copy of Biegel's December 6, 2010 reply e-mail to counsel opposite; said e-mail clearly establishes that Biegel was unaware of the *Order* entered on November 1, 2010 and believed that the trial court would allow a hearing on the post-trial Motion prior to rendering a ruling. (R.

43).

Biegel's belief and intent that there would be a hearing on the Cueavases' post-trial Motion is also reflected in both the opening paragraph and paragraph 16. of the post-trial Motion which state as follows:

> Comes now Lloyd Wayne Cuevas ("Wayne") and Charlotte Angell Cuevas ("Charlotte"), and files this their *Motion to Alter or Amend Findings, Conclusions and Final Judgment or, in the Alternative, Grant a New Trial* pursuant to *MRCP* 52 and 59, and for cause and other good cause **to be shown at a hearing hereof** would show:
>
> * * * * *
>
> 16. For the reasons set forth hereinabove, for other good cause **to be shown at a hearing hereon**, and any additional reason revealed by the title opinion and survey of the property which is being performed, the findings, conclusions and Judgment which was entered should be:.....

(R. 8, 17).

Despite the fact that Cuevases' *Motion to Reopen Time for Appeal* was set for hearing on January 14, 2011 (R. 47), the trial court entered an *Order* on January 5, 2011 denying said motion (R. 50), and it is from this *Order* that the Cueavases' timely filed their *Notice of Appeal*. (R. 51).

In Smith's and Ladner's Opposition, there is no allegation of prejudice if the time for appeal is reopened. (R. 44).

The record is void of any evidence that Smith or Ladner will be prejudiced if the time for appeal is reopened. (R. 44).

STATEMENT OF ISSUE AND SUMMARY OF THE ARGUMENT

The lower Court erred when it denied the request of the Cuevases to reopen the time for appeal for a period of fourteen (14) days from the date of entry of its Order reopening time for appeal.

The trial Court abused its discretion in denying the Cuevases' *Motion to Reopen Time for Appeal* which was filed in compliance with *MRAP* 4(h).

ARGUMENT

The trial court's decision of whether to grant a motion pursuant to *MRAP* 4(h) is reviewed by the appellate court for an abuse of discretion. *Pre-Paid Legal Services, Inc. v. Anderson*, 873 So.2d 1008, 1009 (¶4)(Miss. 2004) citing *Horowitz v. Parker*, 852 So.2d 686, 689 (Miss.Ct.App. 2003); *Pinkston v. Miss. Dep't of Transp.*, 757 So.2d 1071, 1073 (Miss.Ct.App. 2000).

MRAP 4(h) states as follows:

> *Reopening time for appeal.* 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.

MRAP 4(h) (2010).

The comment to *MRAP* 4(h) states, in part:

> While 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. Citing *Nunley v. City of Los Angeles*, 52

F.3d 792, 798 (9th Cir. 1995).

* * * * *

> While the trial court retains some discretion to refuse to reopen the time for appeal even when the requirements of Rule (4)(h) are met, the concept of excusable neglect embodied in Rule 4(g) simply has no place in the application of Rule 4(h). Citing *Avolio v. Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994).

MRAP 4(h) cmt. (2010).

> A close reading of M.R.A.P. 4(h) reveals that two requirements must be met before the time for appeal may be reopened: (1) that a party entitled to receive notice fails to receive such notice from the *clerk* or *any party* within 21 days of its entry; and (2) that no party would be prejudiced, with prejudice defined as some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal. Once these are established, a motion must be filed within 180 days of entry of the judgment or within 7 days of receipt of such notice, whichever is earlier.

Duncan v. Duncan, 774 So.2d 418, 420 (¶7)(Miss. 2000).

In each of the following cases, the appellate court reversed the trial court's denial of a *timely filed* motion to reopen time for appeal pursuant to *MRAP* 4(h):

1. *Duncan v. Duncan*, 774 So.2d 418 (Miss. 2000);

2. *Boyles v. Schlumberger Technology Corp.*, 792 So.2d 262 (Miss. 2001);

3. *Horowitz v. Parker*, 852 So.2d 686 (Miss.App. 2003); and

4. *Mississippi Public Employees' Retirement System v. Lee*, 23 So.3d 528 (Miss.App. 2009).

In both *Twine v. City of Gulfport* and *Winter v. Wal-Mart Supercenter*, the appellate court affirmed the trial court's

granting of a *timely filed* motion for out of time appeal. *Twine v. City of Gulfport*, 833 So.2d 596 (Miss.App. 2002); *Winter v. Wal-Mart Supercenter*, 26 So.3d 1086 (Miss.App. 2009).

Additionally, in *Twine*, the appellate court stated that although the trial judge's law clerk notified counsel for Twine that an order would be issued prior to December 1, 2000, this placed no duty on Twine to contact the clerk's office to see if the order had been issued. *Twine*, 833 So.2d at 599 (¶6).

In affirming the trial court's decision in *Winter*, the appellate court stated that Winter did not have to show excusable neglect in order to sustain a motion for out of time appeal. *Winter*, 26 So.3d at 1089 (¶9).

In *Duncan*, *Boyles*, *Horowitz*, *Mississippi Public Employees' Retirement System*, *Twine*, and *Winter*, the appellate court found that the motion to reopen time for appeal was filed within seven days of receipt of notice of the order or judgment, and, therefore *timely filed* in accordance with *MRAP* 4(h). Likewise, the Cuevases' motion was *timely filed*, but as in *Twine* and *Winter*, the trial court abused its discretion in denying the Cuevases' motion.

To the Cuevases' knowledge, *Clayton v. Hartsog* is the only reported civil case wherein a motion was *timely filed* in accordance with *MRAP* 4(h) and the trial court did not abuse its discretion in denying said motion. *Clayton v. Hartsog*, 970 So.2d 248 (Miss.App. 2007). However, the *Clayton* facts are wholly distinguishable from the case at bar. The Cueavases' lawsuit has not been adjudicated

as frivolous, nor has there been sanctions imposed against the Cuevases.

In *Clayton*, the county court issued summary judgment to Hartsog and "took the extraordinary step" of sanctioning Clayton for filing a frivolous suit, and then, the circuit court affirmed the county court on both issues. *Clayton*, 970 So.2d at 250 (¶6). Based on these underlying facts of the frivolous nature of Clayton's lawsuit and the sanctions imposed upon Clayton, the appellate court affirmed the circuit court's denial of Clayton's motion to reopen the time for appeal. *Clayton*, 970 So.2d at 250 (¶6).

In *Pre-Paid Legal Services, Inc. v. Anderson*, counsel for the defendants, collectively referred to as Pre-Paid, filed a motion pursuant to *MRAP* 4(h) within five (5) days of learning of an order and judgment entered approximately two months earlier by the Holmes County Circuit Clerk. *Pre-Paid Legal Services, Inc. v. Anderson*, 873 So.2d 1008, 1009 (¶2)(Miss. 2004). The circuit judge denied Pre-Paid's motion after stating that she "has to go by the records of the clerk's office, and those records indicate that it was served on the parties." *Anderson*, 873 So.2d at 1009 (¶3).

In *Anderson*, the Supreme Court of Mississippi explained that the two affidavits presented by counsel for the defendants (movant to reopen time) rebutted and terminated the presumption that notice was received based on the clerk's records and reversed the circuit court's denial of Pre-Paid's motion. *Anderson*, 873 So.2d at 1009

(¶7, 9). The Court also explained that it is irrelevant that the defendants' counsel were present when the ruling was announced and the order signed because *MRCP* 77(d) clearly requires the clerk to provide notice of "entry" of an order or judgment. *Anderson*, 873 So.2d at 1010 (¶8).

Finding the issue in *Prepaid Legal Services, Inc. v. Taylor* to be identical to the issue in *Anderson*, the Supreme Court also reversed the circuit court in *Taylor*. *Prepaid Legal Services, Inc. v. Taylor*, 904 So.2d 1059, 1060 (¶9)(Miss. 2004). The Supreme Court reversed the denial of Pre-Paid's timely filed motion to reopen time for appeal as provided in *MRAP* 4(h) in reliance upon *Anderson* and noted that "Taylor did not offer proof via affidavits or otherwise from the Chancery Clerk's office showing that notice was in fact sent and/or received." *Taylor*, 904 So.2d at 1061 (¶10, 11).

In the case at bar, Ladner and Smith allege that the Court records indicate that such notice was sent to all counsel of record. (R. 44). However, as in *Taylor*, Ladner and Smith did not offer proof via affidavits or otherwise from the Harrison County Chancery Clerk's office showing that notice was, in fact, sent and/or received by Biegel.

As set forth in the comments to *MRAP* 4(h) and *Anderson*, Biegel's affidavit rebuts and terminates the presumption that the Cuevases or their counsel received notice of the Court's November 1, 2010 *Order* based on the clerk's records.

Counsel for the Cueavases was first notified of the Court's November 1, 2010 *Order* on December 7, 2010 and immediately served a *Motion to Reopen Time for Appeal* that very day. (R. 38). As in *Duncan*, *Boyles*, *Horowitz*, *Mississippi Public Employees' Retirement System*, *Twine*, and *Winter*, the Cuevases motion to reopen time for appeal was timely filed in accordance with *MRAP* 4(h), within seven days of receipt of notice of the order or judgment.

The record contains no evidence or supports any inference that Ladner or Smith would be in any way prejudiced if the Cuevases are allowed an out-of-time appeal.

In Ladner's and Smith's Opposition, they claim that counsel for the Cuevases has a duty to be diligent to check the docket and Court records to determine if a ruling or order had been entered when a case has been taken under advisement. (R. 44). Again, as reflected in the Cuevases' post-trial Motion and in Biegel's December 6, 2010 e-mail to counsel opposite, the Cuevases anticipated a hearing on their motion and was not aware that the Court had taken said motion under advisement.

Assuming *arguendo* that the Cuevases were aware that said motion was under advisement, they had no duty to contact the clerk's office to see if the order had been issued, just as Mr. Twine had no such duty in *Twine* although the judge's law clerk advised Twine's counsel the time timing of when an order would be issued. Furthermore, as reaffirmed in *Anderson*, *MRCP* 77(d) clearly requires the clerk to provide the Cuevases notice of "entry" of an

order or judgment. *Anderson*, 873 So.2d at 1010 (¶8); *MRCP* 77(d) (2010).

In Ladner's and Smith's Opposition, they claim that the Cuevases must show "excusable neglect" and that "mere failure to learn of entry of the judgment is generally not a ground for showing excusable neglect" but more must be shown. (R. 45). Ladner's and Smith's statement of the law is inaccurate. *MRAP* 4(h) does not require a showing of excusable neglect. *Winter*, 26 So.3d at 1089 (¶9); *MRAP* 4(h) cmt. (2010).

In the case at bar, the Cuevases did not receive notice of the trial court's *Order* from the clerk or any party within 21 days of its entry and fully complied with *MRAP* 4(h) by filing their motion to reopen within 7 days of their receiving notice of the *Order* which is earlier than 180 days of entry of the *Order*. Granting the Cuevases' Motion for an out-of-time appeal will not prejudice Ladner nor Smith.

The facts surrounding the motion and decision of the trial court in the case at bar are identical to *Taylor*, and, therefore, this Court should follow that precedent and find the trial court erred in denying the Cueavases' *Motion to Reopen Time for Appeal*.

CONCLUSION

For the reasons stated hereinabove, this Court should reverse and remand this case to the trial court with instructions to enter an order allowing the Cuevases fourteen (14) days from the date of entry of that Order to take an out-of-time appeal as provided in

MRAP 4(h).

RESPECTFULLY SUBMITTED this the 29th day of April, 2011.

LLOYD WAYNE CUEVAS AND
CHARLOTTE ANGELL CUEVAS, Appellants

By: Michele D. Biegel
MICHELE D. BIEGEL, Attorney for Appellants

CERTIFICATE OF SERVICE

I, Michele D. Biegel, certify that I have this date served a copy of the above and foregoing **Brief of Appellants** by placing a copy of same in the United States mail, postage prepaid, addressed to the regular business mailing addresses of:

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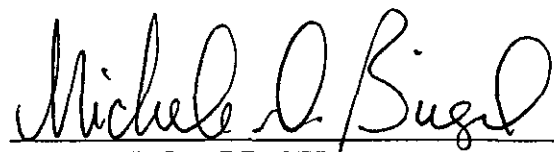
ATTORNEY FOR ANGELA K. LADNER AND
KELLY C. SMITH

Honorable Eugene L. Fair, Jr.
Post Office Box 872
Hattiesburg, Mississippi 39403

SPECIAL CHANCELLOR

THIS the 29th day of April, 2011.



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ADDENDUM

their appeal because, while the parents' notice of appeal should have included the final judgment, the basis of the appeal was abundantly clear from the parents' statement of the issues and their brief of appellant. K.D.F. v. J.L.H., 933 So. 2d 971 (Miss. 2006).

Timeliness.

Grandmother's appeal was timely where an immediate appeal of a denial of an application for leave to intervene under Miss. R. Civ. P. 24 was not required and the father did not file a brief in the current appeal, Miss. R. App. P. 31(d). S.G. v. D.C., 13 So. 3d 269 (Miss. 2009).

Order to compel arbitration.

A trial court's order compelling arbitration which disposes of all the issues before the court or orders the entire controversy to be arbitrated is a final decision, and therefore, immediately appealable, and further, any final decision with respect to arbitration is appealable to the Supreme Court pursuant to Miss. R. App. 3 and 4 (overruling Banks v. City Finance Co., 825 So. 2d 642 (Miss. 2002)). Sawyers v. Herrin-Gear Chevrolet Co., 26 So. 3d 1026 (Miss. 2010).

Rule 4. Appeal as of right — When taken.

(a) *Appeal and cross-appeals in civil and criminal cases.* Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) *Notice before entry of judgment.* A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) *Notice by another party.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) *Post-trial motions in civil cases.* If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of facts, whether or not granting the motion would alter the judgment; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) *Post-trial motions in criminal cases.* If a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 5.16, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(f) *Parties under disability.* In the case of parties under a disability of infancy or unsoundness of mind, the various periods of time for which provision is made in this rule and within which periods of time action must be taken shall not begin to run until the date on which the disability of any such party shall have been removed. However, in cases where the appellant infant or person of unsound mind was a plaintiff or complainant, and in cases where such a person was a party defendant and there had been appointed for him or her a guardian ad litem, appeals to the Supreme Court shall be taken in the manner prescribed in this rule within two years of the entry of the judgment or order which would cause to commence the running of the 30 day time period for all other appellants as provided in this rule.

(g) *Extensions.* The trial court may extend the time for filing a notice of appeal upon motion filed not later than 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.

(h) *Reopening time for appeal.* 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.

(i) *Taxpayer appeals.* If the board of supervisors of any county, or the mayor and board of aldermen of any city, town or village, or any other board, commission or other officer of any county, or municipality, or district, sued in an official capacity, fails to file a notice of appeal under Rule 4(a) within 20 days after the date of entry of an adverse judgment or order, or within 7 days after

filing of a notice by another party pursuant to Rule 4(c), any taxpayer of the county, municipality or district shall have the right at the taxpayer's own expense to employ private counsel to prosecute the appeal in compliance with these rules. If the governmental entity files a notice of appeal, the appeal shall not be dismissed if any such taxpayer objects and prosecutes the appeal at the taxpayer's own expense. (Amended effective July 1, 1997; July 1, 1998.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, a new Rule 4(h) was added to provide for reopening of time for appeal in the event that a notice of entry of judgment is not received. The former Rule 4(h) was redesignated 4(i). 689-692 So. 2d LXII (West Miss. Cases 1997).

Effective January 1, 1995, Miss.R.App.P. 4 replaced Miss.Sup.Ct.R. 4, embracing proceedings in the Court of Appeals. 644-647 So.2d XXVII-XXX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So. 2d V (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to provide that the date of the entry of the judgment is the date the judgment is entered in the general docket of the clerk of court, and to delete an outdated case citation. 632-635 So.2d XLIV-XLV (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; July 1, 1998.]

COMMENT

Rule 4 applies to appeals and cross-appeals in all civil and criminal cases. The date of entry of judgment is the date the judgment is entered in the general docket of the clerk of the court. M.R.C.P. 58.

The notice of appeal requirement applies to all forms of appeal, including cross-appeals. Rule 4(c) requires that a notice of appeal for a cross-appeal be filed within 14 days after the date on which the first notice of appeal was filed, unless a longer period is prescribed by another provision of Rule 4.

Previously, Rule 4(d) specified certain post-trial motions that had to await disposition before a valid notice of appeal could be filed. Any notice of appeal filed before such disposition had no force or effect. Rule 4(e) had the same provisions for specified post-trial motions in criminal cases. Those provisions of Rules 4(d) and 4(e), however, created a trap for an unsuspecting litigant who filed a notice of appeal before a post trial motion, or while a post trial motion was pending. Because the Rules required a party to file a new notice of appeal after the motion's disposition, unless a new notice was filed the Supreme Court lacked jurisdiction to hear the appeal. *See In re Kimbrough*, 680 So.2d 799 (Miss.1996). Many litigants, especially *pro se* litigants, failed to file the second notice of appeal, and the Court expressed dissatisfaction with the rule. *See id.* (Banks, J., dissenting) and (McRae, J., dissenting).

Rules 4(d) and 4(e) now provide that a notice of appeal filed before the disposition of a specified post trial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before its disposition is, in effect, suspended until the motions disposition, whereupon the previously filed notice effectively places jurisdiction in the Supreme Court. Still, ordinarily, the filing of a notice of appeal should come after the disposition of these motions. An appeal should not be noticed and docketed in the Supreme Court while it is still possible that the appealing party may obtain relief in the trial court.

Because a notice of appeal will ripen into an effective appeal upon disposition of a post trial motion, in some instances

there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, an additional notice of appeal is unnecessary.

While Rule 4 is patterned after its Federal counterpart, Rule 4(d) departs from Federal practice by providing that a valid notice of appeal is effective to appeal from an order disposing of a post trial tolling motion. Under Fed. R. App. P. 4(a)(4), if a party wishes to appeal from the disposition of a post trial tolling motion, the party must amend the notice to so indicate. However, requiring amendment of the notice of appeal would create a new, albeit less severe, trap for unsuspecting litigants, without serving a substantial purpose.

Rule 4(d) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is filed within 10 days after entry of judgment. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a Rule 59 motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. *See Michael v. Michael*, 650 So.2d 469 (Miss. 1995).

Rule 4(f) continues to recognize an extension for parties under a legal disability. See *Parks v. Knight*, 491 So. 2d 217 (Miss. 1986).

Rule 4(g) is based on Fed. R. App. P. 4(a)(5). A motion filed before expiration of the 30 day period may be ex parte and may be granted for any "good cause." This standard is identical to that found in Rule 26. The extension may not go beyond 30 days after the time prescribed in Rule 4(a).

If the motion is not filed until the extension period has begun to run, the burden rests on the appellant to show the failure to file a timely notice was a result of "excusable neglect." Mere failure to learn of entry of the judgment is generally not a ground for showing excusable neglect. Counsel in a case taken under advisement has a duty to check the docket regularly. But see *City of Gulfport v. Saxon*, 437 So. 2d 1215, 1217 (Miss. 1983) (when trial court sits as an appellate court, parties may reasonably expect notification from the court or clerk when a ruling is made). Filing a notice is a simple act, and a party must do all it could reasonably be expected to do to perfect the appeal in a timely fashion. Counsel's failure to read published rules of court and counsel's reliance on mistaken legal advice from a trial court clerk will not show excusable neglect. *Campbell v. Bowlin*, 724 F. 2d 484, 488 (5th Cir. 1984); *Reed v. Kroger Co.*, 478 F. 2d 1268 (T.E.C.A. 1973). Excusable neglect will not be shown by counsel's busy trial schedule. *Pinero Schroeder v. Fed. Nat'l Mtg. Ass'n*, 574 F. 2d 1117 (1st Cir. 1978).

On the other hand, a party misled by actions of the court can establish excusable neglect. See *Chipser v. Kohlmeyer & Co.*, 600 F. 2d 1061, 1063 (5th Cir. 1979); *In re Morrow*, 502 F. 2d 520, 522 (5th Cir. 1974) (dictum). Excusable neglect may be shown where a timely mailed notice was late because of unanticipated and uncontrollable delays in the mail. *Fallen v. United States*, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964). See generally, 20 W. Moore, *Federal Practice* § 304-13.

An excusable neglect motion must be filed within the 30 day extension period. The extension will be limited to that period, or to a period ending 10 days after the entry of an order granting the motion, whichever occurs later.

In criminal cases, the Court may suspend Rule 4 to permit out of time appeals. Post-conviction relief proceedings are governed by the rules controlling criminal appeals. See Miss. Code Ann. § 99-39-25(1)(1994); *Williams v. State*, 456 So. 2d 1042, 1043 (Miss. 1984). No such suspension, however, is permitted in a civil case. See Rules 2(c); 26(b).

Rule 4(h) is patterned after Fed. R. App. P. 4(a)(6), which was added to the Federal Rules in 1991. Rule 4(h) provides a limited opportunity for relief, independent of and in addition to that available under Rule 4(g), in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the trial court pursuant to Rule 77(d) of the Mississippi Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. Rule 4(h) allows a trial court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. While 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. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 798 (9th Cir. 1995). "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. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

While the trial court retains some discretion to refuse to reopen the time for appeal even when the requirements of Rule (4)(h) are met, the concept of excusable neglect embodied in Rule 4(g) simply has no place in the application of Rule 4(h). *See Avolio v. Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994). "To hold otherwise would negate the addition of Rule 4[h], which provides an avenue of relief separate and apart from Rule 4[g]." *Nunley v. City of Los Angeles*, 52 F.3d 792, 797 (9th Cir. 1995). Thus, "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." *Id.* at 798.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment or order to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment or order, as authorized by Miss. R. Civ. P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the trial court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

The taxpayer who prosecutes an appeal under Rule 4(i) must comply with these rules and file a timely notice of appeal under 4(a), or 4(c), if applicable.

[Amended effective July 1, 1997; July 1, 1998; April 18, 2007.]

JUDICIAL DECISIONS

Cross-appeals.

In a child support and visitation case, a mother's appeal was procedurally barred under Miss. R. App. P. 4 because it was