



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

ELISHA BALLARD, : No.: 361,2017  
: :  
Plaintiff Below, :  
Appellant, :  
: :  
v. :  
: :  
TAKEDA PHARMACEUTICALS :  
AMERICA, INC., TAKEDA :  
PHARMACEUTICALS U.S.A., :  
INC, f/k/a TAKEDA :  
PHARMACEUTICALS NORTH :  
AMERICA, INC., TAKEDA : Trial Court Below:  
PHARMACEUTICAL COMPANY : Superior Court of the State of  
LIMITED, and ELI LILLY and : Delaware  
COMPANY, : C.A. No.: N16C-10-177 JRJ  
: :  
Defendants Below, :  
Appellees. :

**APPELLANT'S OPENING BRIEF**

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### Nature of Proceeding

This is an appeal from the trial court's denial of plaintiff's motion to extend the time to perfect service of process pursuant to Superior Court Civil Rule 4(j).

## Summary of Argument

Plaintiff demonstrated both good faith and a reasonable basis for noncompliance in connection with its failure to serve the Defendants within 120 days in the Elisha Ballard Action. The Elisha Ballard Action was mistakenly confused with the earlier filed Jerry Ballard Action which involved the same alleged injuries asserted against identical defendants. Despite internal case tracking mechanisms and other safeguards, the mistake resulted in duplicative service being made in the Jerry Ballard Action and the failure to timely serve and perfect process in the Elisha Ballard Action. Once the mistake was discovered, plaintiff promptly moved to extend the time in which to serve the defendants in the Elisha Ballard Action. The trial court's denial of the motion to extend the time to serve under these circumstances was an abuse of discretion.

## Statement of Facts

On August 30, 2016, a case styled *Jerry Ballard v. Takeda Pharmaceuticals America Inc., et.al.*, C.A. No. N16C-08-253, was filed.<sup>1</sup> The suit alleges that Mr. Ballard suffered personal injuries as a result of ingesting the prescription drug Actos® (hereinafter the "Jerry Ballard Action"). On September 28, 2016, six (6) service writs issued in the Jerry Ballard Action. On October 17, 2016, Takeda Pharmaceuticals America Inc. and Takeda Pharmaceuticals USA Inc. f/k/a Takeda Pharmaceuticals North America Inc. were served in the Jerry Ballard Action and all defendants answered the complaint on November 2, 2016.<sup>2</sup>

On October 21, 2016, a case styled *Elisha Ballard v. Takeda Pharmaceuticals America Inc., et al.*; C.A. No. N16C-10-177, was filed naming the identical defendants. The suit alleges that Ms. Ballard suffered personal injuries as a result of ingesting the prescription drug Actos.® (hereinafter the "Elisha Ballard Action"). On or about November 28, 2016, Plaintiffs Attorney's paralegal ordered a check payable to the New Castle County Sheriff to obtain writs necessary for service of process in the Elisha Ballard Action.<sup>3</sup> As a result of the similarities of the Ballard actions, *i.e.*, the identical last name of plaintiffs, the identical defendants and identical alleged injuries, the Elisha Ballard Action was

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<sup>1</sup> A0092-A0107; Trans. Id. No. 59493087.

<sup>2</sup> A0116; Trans. Id. No. 59705209; A0117; Trans. Id. No. 59705210; A0118-A0169; Trans. Id. No. 597779728.

<sup>3</sup> A0038-A0039, ¶5; Trans. Id. No. 60504882.

mistakenly confused with the Jerry Ballard Action and plaintiffs requested writs for service in the Jerry Ballard Action for a second time on December 7, 2016 rather than requesting them for the intended Elisha Ballard Action.<sup>4</sup> The mistake resulted in duplicative service in the Jerry Ballard Action<sup>5</sup> and the omission of service in the Elisha Ballard Action.

On April 11, 2017 during a scheduling conference with the Trial Court, the Court indicated it would enter a Case Management Order (“CMO”) which provided, *inter alia*, that rather than having to serve Takeda Pharmaceutical Company Limited, which is a Japanese company, via the Hague Convention, that service may be effected by serving Takeda Pharmaceutical Company Limited's general counsel and Takeda Pharmaceutical Company Limited at designated addresses via registered mail, return receipt requested, or via commercial courier service that provides equally reliable evidence of delivery.

Subsequent to the scheduling conference, on April 16, 2017, a review of the multiple Actos® cases filed in Delaware by plaintiffs’ Firm was conducted to conform the manner of service on Takeda Pharmaceutical Company Limited to the provisions of the CMO. During this review, the mistaken, duplicative service in

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<sup>4</sup> A0038-A0039, ¶6; Trans. Id. No. 60504882.

<sup>5</sup> A0108-A0115; Trans. Id. No. 60448380; A0116; Trans. Id. No. 60133489; A0117; Trans. Id. No. 60133486.

the Jerry Ballard Action was discovered.<sup>6</sup> Plaintiff thereafter filed her Motion For Order Extending, For Cause, The Time Limit For Service Under Rule 4(j) of the Superior Court Civil Rules. (“Motion to Extend”).<sup>7</sup>

Oral argument was held May 24, 2017 on Plaintiff’s Motion to Extend and the Trial Court denied the motion on August 7, 2017.<sup>8</sup>

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<sup>6</sup> A0038-A0039, ¶8; Trans. Id. No. 60504882.

<sup>7</sup> A0031-A0041; Trans. Id. No. 60504882.

<sup>8</sup> A0062; Trans. Id. No: 60639637; (A copy of The Honorable Judge Jurden’s Opinion is attached as Exhibit A, hereto).

## Argument

### A) Questions Presented

Whether the trial court abused its discretion when it held that plaintiff had not established good cause to extend the time in which to perfect service of process upon defendants in the Elisha Ballard Action and dismissed the complaint?<sup>9</sup>

### B) Scope of Review

Appellate courts review the trial court's determination that a party failed to show good cause to extend the time limit for services of process for abuse of discretion.<sup>10</sup> An abuse of discretion occurs when the trial judge has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice.<sup>11</sup>

### C) Merits of Argument

Superior Court Civil Rule 4(j) requires that service of the summons and complaint needs to be made on the defendant(s) within 120 days after the filing of the complaint. This rule is not absolutely inflexible. In fact, Delaware law has a "strong judicial policy of deciding cases on the merits and giving parties to

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<sup>9</sup> See A0031-A0036 (Plaintiff's Motion for Order, Extending, For Cause, the Time Limit for Service of Process Under Rule 4(j) of the Superior Court Civil Rules); Trans ID. 60504882.

<sup>10</sup> *DeSantis v Chilkotowsky*, Del. Supr., 877 A.2d 52 (2005).

<sup>11</sup> *Gillen v. Cont'l Power Corp.*, 2014 Del. LEXIS 548, \*7 (Del. 2014) (*internal citations omitted*).

litigation their day in court." <sup>12</sup> Under Civil Rule 4(j), the Court can extend the 120 days for good cause shown. While "good cause" is not defined within the rule, it has been interpreted to require a showing of excusable neglect, by a "demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." <sup>13</sup> That is, by showing "neglect which might have been the act of a reasonably prudent person under the circumstances." <sup>14</sup> Although delays resulting from "mistake or inadvertence of counsel" do not establish excusable neglect, mere negligence with a valid reason will constitute excusable neglect. <sup>15</sup> In determining whether the moving party's neglect was "excusable," all surrounding circumstances may be considered. <sup>16</sup>

Counsel's actions in this case constitute excusable neglect based on the surrounding circumstances and valid reasons for such neglect were presented to the trial court by motion and during oral argument.

The trial court properly recognized the standards for good cause and excusable neglect as set forth above. <sup>17</sup> The trial court also properly determined

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<sup>12</sup> *Jackson v Minner*, 2011 Del. Super. LEXIS 115 (2011) (*internal citations omitted*).

<sup>13</sup> *Dolan v Williams*, 707 A.2d 34, 36 (Del. 1998) (*internal citations omitted*).

<sup>14</sup> *Id.*

<sup>15</sup> *See, Wass v. Calloway*, 1999 WL 190020, at \*3 (Del. Super. Feb. 21, 1996) (*internal citations omitted*); *see also, Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011).

<sup>16</sup> *DiSabatino v. DiSabatino*, 2007 WL 812766, at \*3 (Del. 2007) (*internal citations omitted*).

<sup>17</sup> Exhibit A at 8-10.

that the delay of service of the summons and complaint was the result of a mistake and neglect.<sup>18</sup> However, the trial court abused its discretion by not fully considering all surrounding circumstances for such mistake and neglect.

First, the trial court improperly concluded that counsel failed to act as a reasonably prudent attorney should and would have acted under the circumstances.<sup>19</sup> Per counsel's affidavit, there was internal case tracking mechanisms in place whereby case management is controlled and monitored.<sup>20</sup> The case tracking mechanisms includes the tracking of service events and regular meetings between the managing partner and the paralegal to discuss service tracking issues to ensure that service is made in a timely matter according to the rules of civil procedure.<sup>21</sup> Despite these internal measures and controls, a good faith mistake was made in the Elisha Ballard Action due to its almost identical similarity with the Jerry Ballard Action.<sup>22</sup> Once the mistake was realized, counsel promptly acted to rectify the mistake.<sup>23</sup> Based on counsel's affidavit, reasonable measures were in place so as to comply with the Delaware Lawyers' Rules of Professional Conduct and counsel acted as a reasonable and prudent attorney with regard to the service of complaints and oversight of non-attorneys. As such,

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<sup>18</sup> Exhibit A at 14.

<sup>19</sup> Exhibit A at 16-17.

<sup>20</sup> *See generally*, A0082-A0084;Trans. ID. 60744707.

<sup>21</sup> A0082-A0084, ¶¶ 8-9;Trans. ID. 60744707.

<sup>22</sup> A0082-A0084, ¶ 10;Trans. ID. 60744707.

<sup>23</sup> A0082-A0084, ¶11; Trans. Id. No. 60744707.

counsel's reasons for failure to timely perfect service in the Elisha Ballard Action amount to excusable neglect and the trial court abused its discretion in denying Plaintiff's request to enlarge time to serve the complaint.

Second, the trial court relied on *Desantis* to conclude that counsel's failure to timely discover that service had not occurred precluded a finding of good cause.<sup>24</sup> However, this case is distinguishable from *Desantis*. The *Desantis* case involved a plaintiff who attempted to serve defendant through the New Jersey secretary of state, however defendant was a resident of Delaware and the attempt at service failed.<sup>25</sup> The Court found that when no return receipt was received, plaintiff should have been aware that service was not properly affected.<sup>26</sup> In the instant case, counsel did not attempt to serve Defendants at the wrong address, but instead mistakenly completed service in the Jerry Ballard Action, a case with the same Defendants, same claims, and the identical last name of the plaintiff. No writs were issued in the Elisha Ballard Action, there was no attempt to serve the Defendants in the Elisha Ballard Action, and the Sheriff did not file "non-est" service returns in the Elisha Ballard Action. There was no reason for counsel to know that service was not perfected in the Elisha Ballard Action because, due to the mistake, there was a good faith, albeit erroneous belief that service had been

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<sup>24</sup> Exhibit A at 15.

<sup>25</sup> *Desantis v. Chilkotowsky*, 2004 WL 1790113 (Del. Super. July 27, 2004), *aff'd*, 877 A.2d 52, (Del. 2005).

<sup>26</sup> *Desantis*, 2004 WL 1790113 at \*1.

made. In light of these circumstances, the neglect in this case was excusable and the trial court abused its discretion in denying Plaintiff's request to enlarge the time to serve the complaint.

Finally, the trial court recognized that *Jackson v Minner*, 2011 Del. Super. LEXIS 115 (2011) is similar to this case but distinguished it.<sup>27</sup> In *Jackson*, a *pro se* Sussex Correctional Institution inmate, attempted to serve defendants, at what he mistakenly believed was their Sussex County office. The Defendants, however, worked in Kent County. Under these circumstances the *Jackson* Court found that the failure to serve constituted excusable neglect and allowed an additional 120 days to effect service. Here, plaintiff mistakenly believed that service had been made in the Elisha Ballard Action. The trial court distinguished *Jackson* on the basis that this Firm has the resources and ability to verify that each stage of service of process has occurred in accordance with the Superior Court Rules. Plaintiff's agree with the trial court's assessment, however, but for the good faith mistaken belief that service had been perfected on Elisha Ballard, plaintiff's would have discovered the error in service and taken action within the 120 day time frame to correct the error.

Based on the foregoing, it is respectfully submitted that the trial court abused its discretion in denying Plaintiff's motion to enlarge time for service of process as

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<sup>27</sup> Exhibit A at 11.

the trial court's reasoning exceeded the bounds of reason in view of the circumstances.

Dated: December 12, 2017

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