

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

---

NO. 2003-CA-02699

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MARILYN BUSBY

APPELLANT

VS.

PATRICIA ANDERSON, EXECUTRIX OF THE  
ESTATE OF WILLIAM BURNLEY, DECEASED

APPELLEE

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**SUPPLEMENTAL BRIEF OF APPELLEE,  
PATRICIA ANDERSON, EXECUTRIX OF THE  
ESTATE OF WILLIAM BURNLEY, DECEASED**

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**ON APPEAL FROM THE CIRCUIT COURT OF  
WASHINGTON COUNTY, MISSISSIPPI**

**ORAL ARGUMENT NOT REQUESTED**

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WILLIAM BURNLEY, DECEASED

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellee certifies that the following are listed in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Marilyn Busby, Appellant;
2. William Burnley, deceased, Appellee;
3. Richard L. Kimmell, Esq., Attorney for Marilyn Busby;
4. Cam Auerswald, Esq., Attorney for Marilyn Busby;
5. Roy A. Smith, Jr., Esq., Attorney for William Burnley;
6. Tara S. Clifford, Esq., Attorney for William Burnley;
7. Nathan P. Adams, Esq., Attorney for Estate of William Burnley, Deceased
8. Patricia Anderson, Executrix of William Burnley Estate
9. Honorable Margaret Carey-McCray, Trial Judge.

THIS the 12<sup>th</sup> day of December, 2007.

  
TARA S. CLIFFORD

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COMES NOW Appellee, Patricia Anderson, Executrix of the Estate of William Burnley, Deceased (hereinafter "Burnley"), pursuant to Mississippi Rule of Appellate Procedure 17(h), and files the following Supplemental Brief, and in support states as follows:

## **I. INTRODUCTION**

On November 29, 2007, this Court granted this Appellee's Petition for Writ of Certiorari. On November 28, 2006, the Court of Appeals ruled that the appeal was timely and reversed the decision of the Circuit Court of Washington County, which had affirmed a jury verdict in favor of Mr. Burnley and remanded this case for a new trial. Burnley argues that the record shows that this case was dismissed by operation of M.R.A.P. 15 (a) - (c) (1996) in April of 2001, two and one half years prior to any appeal being filed. Accordingly, there is no appeal to be heard and this appeal should be dismissed.

## **II. FACTS**

After the jury returned a verdict for Mr. Burnley, the Appellant (hereinafter "Busby") filed post-trial motions on April 27, 2000. (R. 27; R.E. 5). Burnley filed a response to said motions on May 23, 2000. (R. 38; R.E. 14). A hearing was held on August 24, 2000. (R. Supplemental; R.E. 38-39). However, the trial judge did not rule on these combined post-trial motions until, August 13, 2003, three years after the post-trial motions were filed and heard. (R. 52; R.E. 25). Pursuant to M.R.A.P. 15 (a) - (c) (1996), the claim was dismissed almost two and one half years prior to the lower court's ruling.

On September 15, 2003, the Appellant filed a motion to extend time to file a notice of appeal. Prior to the circuit judge ruling on this motion, Busby filed her Notice of Appeal on October 20, 2003. After Busby and Mr. Burnley filed their briefs in this matter, the Court of

Appeals issued an order requiring the circuit court to rule on Busby's September 15, 2003 Motion to Extend time to appeal. (Supplemental R.E. 1). The circuit court judge issued an order granting the extension on April 7, 2006. (Supplemental R.E. 2).

Although the lower court's ruling granting the extension may have cured jurisdictional problems in most circumstances, it did not do so here. The lower court did not have jurisdiction to grant or to deny the extension for the simple reason that no case existed to appeal. The Complaint had been dismissed automatically by operation of M.R.A.P. 15 on or about April 6, 2001. Any appeal of post-trial motions was moot.

### **III. COMPLAINT DISMISSED PURSUANT TO M.R.A.P. 15**

After the jury returned a verdict in favor of Mr. Burnley, Ms. Busby filed post-trial motions on April 27, 2000, to (a) renew request for peremptory instruction/judgment as a matter of law; (b) set aside jury verdict and vacate judgment; (c) for judgment notwithstanding the verdict; or in the alternative, (d) for a new trial; or in the alternative, (e) to alter or amend the judgment for additur. (R. 27; R.E. 5). Mr. Burnley filed a response to said motions on May 23, 2000. (R. 38; R.E. 14). A hearing was held on August 24, 2000. (R. Supplemental; R.E. 38-39). However, the trial judge did not rule on these combined post-trial motions until August 13, 2003, three years after the Court took the motions under advisement. (R. 52; R.E. 25).

This Court does not have jurisdiction to consider this appeal, because the case was dismissed by application of M.R.A.P. 15 (a) - (c) (1996) on or about April 6, 2001. Under the applicable Rule of Appellant Procedure, this action had been dismissed two and one half years

prior to the ruling on Appellant's post-trial motions. M.R.A.P. 15 (a) - (c) (1996).<sup>1</sup> At the time Ms. Busby's combined post-trial motions were filed, Rule 15 of the Mississippi Rules of Appellant Procedure stated:

**(a) When Mandamus Required.** If a trial judge in a civil case fails to render a decision on a motion or request for relief which would be dispositive of all the claims or the rights and liabilities of all the parties, within six (6) months after taking such a motion or request under advisement, any party in the case may apply to the Supreme Court for a writ of mandamus to compel the trial judge to render a decision on the matter taken under advisement or deferred. Application for a writ of mandamus must, except in the case of excusable neglect and in which manifest injustice will result from the failure to allow the later filing, be made within 45 days after the expiration of six (6) months from the date the motion or request was taken under advisement by the trial judge.

. . .

**(c) Effect of Failure to Seek Mandamus.** If a party who filed the original complaint fails to apply for a writ of mandamus within the time prescribed, the complaint shall stand dismissed without prejudice, except upon a showing that the failure to timely apply resulted from excusable neglect and that manifest injustice will result from the dismissal.

M.R.A.P. 15 (a) and (c) (1996).

The trial judge took the matter under advisement after the hearing held on August 24, 2000. (R. Supplemental; R.E. 38-39). Thus, the trial judge had six months, until about February 20, 2001, to rule on the pending post-trial motions. *See Parker v. Livingston*, 817 So. 2d 554 (Miss. 2002). After the expiration of the six month period without any ruling on the post-trial motions, the burden then shifted to the Plaintiff to file a writ of mandamus within 45 days to compel the judge to render a decision. *Edward Dunbar Field, M.D. v. Wayne T. Lamar, M.D.*,

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<sup>1</sup>M.R.C.P. 15 was amended in October 2002. At that time, the rule changed the procedure and time periods for outstanding rulings on motions. However, in April 2001 when the Complaint was technically dismissed without prejudice pursuant to M.R.A.P. 15(c), the 1996 version was the law.

*P.A.*, 822 So. 2d 893, 897 (Miss. 2000). Here, a writ of mandamus was not filed within the 45 day period, nor any time thereafter. (R. 1-2; R.E. 1-2). As Ms. Busby failed to take any action whatsoever, Busby's Complaint was deemed dismissed without prejudice pursuant to Rule 15 of the Mississippi Rules of Appellate Procedure on or about April 6, 2001.

In *Field*, the lower court held that a non-compete clause in a contract was enforceable in May of 1994. *Id.* On January 18, 1995, the court held a hearing to determine if any damages would be awarded. *Id.* Briefs were to be submitted by February 22, 1995. However, the lower court did not rule for over four years or until October 22, 1999. *Id.* This Court determined that the case had been dismissed because the party who filed the Complaint did not follow the M.R.A.P. 15 by failing to apply for a writ of mandamus to compel the lower court to rule on the pending motion. *Id.*

Here, Ms. Busby filed the Complaint against Mr. Burnley seeking damages for injuries resulting from an accident. (R. 4; R.E. 3). After post-trial motions were filed by Ms. Busby and a hearing was held, the trial court did not rule for three years. (R. 27-33, 38-48, 52-56 and Supplemental; R.E. 5-11, 14-24, 25-29, 38-39). In accordance with M.R.A.P. 15, the Complaint was dismissed prior to the ruling, by Ms. Busby's failure to apply for a writ of mandamus to compel the trial court to rule on the motion. The appeal should be dismissed as this action was dismissed in April 2001, six months and 45 days after the hearing on the post-trial motions and three years prior to the circuit court ruling on the post-trial motions and the notice of appeal.

The rule states that the complaint "shall stand dismissed without prejudice, except upon a showing that the failure to timely apply resulted from excusable neglect and that manifest injustice will result from the dismissal." *Id.* Appellant has failed to set forth any reason for her



failure to apply for a writ of Mandamus, much less one that would rise to the level of excusable neglect. Further, Mr. Burnley is now deceased and manifest injustice would result for the appellee if this appeal was allowed to move forward.

As this case was dismissed pursuant to the M.R.A.P. 15 (1996) on or about April 6, 2001, Appellant's Notice of Appeal was untimely by three years. M.R.A.P. 4 (a). The Appellant should not be allowed to sit by and do nothing and then attempt to revive a complaint by filing a motion to appeal a court order. *See Glenn v. Herring*, 415 So. 2d 695 (Miss. 1982). The Complaint was dismissed by operation of M.R.A.P. 15 and thus, there are no issues relating to the trial or post-trial motions to appeal. It is important to also note that Mr. Burnley is not using Rule 15 as a shield against an adverse judgment, as the judgment was entered in favor of Mr. Burnley. Instead, Mr. Burnley is using the Rule to bring an end to a case that has been limping along for 14 years during which time Mr. Burnley has passed away. *See Field v. Lamar*, 822 So. 2d 893 (Miss. 2002). Accordingly, if this appeal is allowed to move forward and this Court ultimately reverses the jury verdict and remands the case to be retried, the driver, Mr. Burnley, will not be able to defend himself at a retrial, and the Estate will only be able to rely on the original transcripts that are now over seven years old. M.R.A.P. 15 is meant to prevent such manifest injustice from happening due to long delays. The party seeking relief must act within a reasonable time as set forth in M.R.A.P. 15. Here, nothing was done.

### CONCLUSION

Simply stated, Mr. Burnley received a defense verdict from the jury at trial on the Complaint filed by Ms. Busby. Post-trial motions were argued and Ms. Busby sat back and did nothing. Not only did Ms. Busby not apply for a writ of mandamus within the required 45 days,

she allowed more than two more years to pass without doing so. This is a clear violation of Rule 15 of the Mississippi Rules of Appellate Procedure. As stated in M.R.A.P. 15 (c), if the party who files the complaint fails to apply for a writ of mandamus within the time prescribed, then the complaint shall stand dismissed without prejudice. That was the holding in *Edward Dunbar Field, M.D. v. Wayne T. Lamar, M.D., P.A.*, 822 So. 2d 893, 897 (Miss. 2002), and the result should be the same here. This appeal should be dismissed as the Complaint was dismissed on April 6, 2001, leaving this Honorable Court without jurisdiction to address the issues on appeal and the lower court without jurisdiction to rule on the post-trial motions or, to extend time for an appeal. Pursuant to M.R.A.P. 15(c), this Complaint has been dismissed and there is nothing to appeal. Therefore, this appeal must be dismissed for lack of jurisdiction and costs assessed to the Appellant.

Respectfully submitted,

WILLIAM BURNLEY, DECEASED BY AND  
THROUGH THE EXECUTRIX OF HIS ESTATE,  
PATRICIA ANDERSON

BY:   
OF COUNSEL

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**CERTIFICATE OF SERVICE**

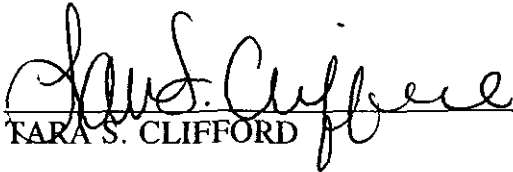
Pursuant to the Mississippi Rules of Appellate Procedure, I, Tara S. Clifford, of counsel for William Burnley, deceased, do hereby certify that we have this day had the original and ten (10) copies of this Supplemental Brief of Appellee, William Burnley, Deceased by and through the Executrix of his Estate, Patricia Anderson, hand-delivered to the Clerk of the Supreme Court of Mississippi and had mailed by first class mail with postage prepaid one true and correct copy of the same to:

Honorable Margaret Carey-McCray  
Circuit Court Judge  
P.O. Box 1775  
Greenville, MS 38702

Richard L. Kimmel, Esq.  
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THIS, the 12<sup>th</sup> day of December, 2007.

  
TARA S. CLIFFORD