IN THE SUPREME COURT OF MISSISSIPPI

ANGELIA K. MIEGER, DONALD MIEGER AND ANGELIA MIEGER AS NEXT FRIEND OF HER CHILDREN, ARIELLE MIEGER AND ANDREW MIEGER — **APPELLANTS**

VERSUS — **CASE NO: 2006-TS-01379**

PEARL RIVER COUNTY (Pearl River County Sheriff's Department) and JOHN/JANE DOES 1-20 — **APPELLEES**

BRIEF OF APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

ANGELIA K. MIEGER, DONALD MIEGER AND ANGELIA MIEGER AS NEXT FRIEND OF HER CHILDREN, ARIELLE MIEGER AND ANDREW MIEGER — **APPELLANTS**

VERSUS — **CASE NO: 2006-TS-01379**

PEARL RIVER COUNTY (Pearl River County Sheriff's Department) and JOHN/JANE DOES 1-20 — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

1. Angelia K. Mieger, Donald Mieger and Angelia Mieger as next Friend of Her Children, Arielle Mieger and Andrew Mieger.....Appellants

2. Margaret Holmes, The Holmes Law Firm, P. A. .....Attorneys for Appellants

3. Michael C. Barefield, Barefield Law Firm, PLLC.....Attorneys for Appellants

4. Pearl River County, MS .....Political Subdivision of State of MS

5. Pearl River County Sheriff's Department.....Instrumentality[1] of Pearl River County, MS

6. J. L. Wilson, IV
Upshaw, Williams, Biggers,
Beckham & Riddick, LLP .....Attorneys for Appellee

RESPECTFULLY SUBMITTED on this 26th day of January, 2007.

Michael C. Barefield, Miss Bar 08822
Attorney for Appellants

[1]Appellants take the position herein that the Pearl River County Sheriff's Department is an "instrumentality" of Pearl River County, MS, as that term is defined, utilized and intended in §11-46-1(i). Said position is being asserted in a good faith attempt to establish a new theory of law in the state, which purpose is being made known to the Court at the time of filing the subject Brief, as contemplated by the Litigation Accountability Act of 1988, §11-55-7(g).

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STATEMENT OF ISSUES

I. WHETHER THE PEARL RIVER COUNTY SHERIFF'S DEPARTMENT IS AN "INSTRUMENTALITY" OF PEARL RIVER COUNTY, MISSISSIPPI AND, THUS, A PROPER DEFENDANT AS DEFINED BY §11-46-1(i).[2]

II. ALTERNATIVELY, IN THE EVENT DISMISSAL WAS PROPER, SHOULD APPELLANT HAVE BEEN GIVEN REASONABLE OPPORTUNITY TO AMEND IN ACCORDANCE WITH RULE 15?

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[2]*See* Footnote 1.

STATEMENT OF CASE

A. Nature of Case

The subject cause of action arose on October 10, 2004, when the Appellant, Angelia K. Meiger, a paramedic working for Emergystat, was severely injured while responding to a call by the Pearl River County Sheriff's Department.

B. Course of Proceedings and Disposition Below

On November 30, 2004, Plaintiff, through counsel, served the requisite Notice of Claim upon the Sheriff, President of Board of Supervisors, and Chancery Clerk (Clerk of Board). (R., p. 80). On September 28, 2005, Plaintiff filed a Complaint naming The Pearl River County Sheriff's Department and John/Jane Does 1-20. (R., pp. 1, 3). Also, on said date, a properly issued summons was served upon Sandra Smith, Deputy Chancery Clerk, ("for David Johnson," Chancery Clerk) and also on said date a copy of the Complaint and summons was mailed to David Johnson, Chancery Clerk. (R., pp. 13-14). Furthermore, on or about January 18, 2006, Carol L. Gypson, Deputy Clerk, acknowledged service of process by mail. (R., p. 18).

Defendant filed *Answer and Defenses to Plaintiff's Complaint*, on February 17, 2006. In said Answer, Defendant admitted to being a "political subdivision of the state of Mississippi." (R., p. 27). Thereafter, Defendant filed a Motion to Dismiss on March 17, 2006 (R., pp. 1, 34-35), alleging that the Pearl River County Sheriff's Department "is not a political subdivision as defined by the Mississippi Tort Claims Act (and) [a]ccordingly, Plaintiff's Complaint fails to state a cause of action and should be dismissed." (R., p. 34). Also on March 17, 2006, without leave of court, Defendant

filed *First Amended Answer and Defenses to Plaintiff's Complaint.* (R., pp. 1, 38-48).

On March 28, 2006, Plaintiffs filed a *Response to Defendant's Motion to Dismiss* and a *Motion for Leave to Amend Complaint.* (R., pp. 1, 50-65). The Response correctly points out that the Defendant continues to admit that it is a "political subdivision" and the Response refers to the *Motion for Leave to Amend Complaint* that seeks to name Pearl River County, specifically, and correctly asserts that the amendment would relate back in accordance with Rule 15. (Id.). An *Amended Motion for Leave to Amend Complaint* was filed on July 3, 2006, asserting, in the alternative that Pearl River County be allowed to be substituted for a John Doe Defendant. (R., pp. 1, 80-92) Defendant opposed the Amended Motion on said grounds.[3]

Defendant noticed a *Motion to Compel* for July 5, 2006, but neither the Motion to Dismiss nor the Motion for Leave to Amend were noticed for oral argument. (R., pp. 1, 75-76). Nevertheless, at oral argument, the Trial Court addressed the Motion to Dismiss and Motion for Leave to Amend. (R., pp. 97-105).

The Court granted Defendant's Motion to Dismiss, but failed to allow Plaintiff the opportunity to amend, stating such an attempt would be "futile due to the running of the statute of limitations and the language of M.R.C.P. Rules 15(c) and 9(h). (R., p. 105)

[3]Appellants no longer assert the right to substitution.

SUMMARY OF THE ARGUMENT

Appellants assert that the Pearl River County Sheriff's Department is an "instrumentality" of Pearl River County, Mississippi and, thus, a proper defendant as defined by §11-46-1(i).[4] In *Brown v. Thompson*, 2006 So.2d (2004-CA-01703-SCT), this Honorable Court held that while

> "[a] Sheriff's Department is not explicitly referred to as a governmental entity in the ***non-exhaustive list*** set forth in the MTCA, . . . the terms "governmental entity" and "political subdivision" are used interchangeably. Political subdivision is defined as:
>
> > [A]ny body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including but not limited to, any county, municipality, school district, community hospital as defined in Section 41-13-10, Mississippi Code of 1972, airport authority or other instrumentality thereof, whether or not such a body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name.
>
> Miss. Code Ann. § 11-46-1(i).

The stautory definition itself explicitly includes not only political subdivisions as proper Defendants under the MTCA, but also "or other *instrumentality **thereof***." It does not appear that the Appellant in *Brown* raised this issue, and this Honorable Court did not address the "instrumentality thereof" language explicitly therein. Thus, it is assumed that the language, and its application to a sheriff's department as an instrumentality of a county was not considered.

Alternatively, in the event dismissal was proper, Appellant should have been given reasonable opportunity to amend in accordance with rule 15. As will be shown below, facts and circumstances were such that said amendment would have been timely and would have related back to the filing of the original complaint.

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[4] *See* Footnote 1.

ARGUMENT

A. Standard of Review

"Upon a motion for dismissal pursuant to Rule 12 (b) (6), the pleaded allegations of the complaint must be taken as true, and a dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Poindexter v. Southern United Fire Ins. Co.*, 2004 So.2d (2003-CA-01483-COA) (quoting *Varvaris v. Perreault*, 813 So.2d 750, 752 (¶ 4) (Miss. Ct. App. 2001)).

> First, we have explicitly stated that, in reviewing Rule 12(b)(6) motions to dismiss, we are actually not required to defer to the trial court's judgment or ruling. Roberts v. New Albany Separate School Dist., 813 So.2d 729, 730-31 (Miss. 2002). Instead, we sit in the same position the trial court did. Id. Additionally, it is clear that our standard here is de novo, and not abuse of discretion. See, e.g., Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 513 (Miss. 2005); Roberts, 813 So.2d at 730-31; Arnona v. Smith, 749 So.2d 63, 65-66 (Miss. 1999). A motion for dismissal under Miss. R. Civ. P. 12(b)(6) raises an issue of law, and we unquestionably review questions of law under a de novo standard of review. Lowe v. Lowndes County Bldg. Inspection Dept., 760 So.2d 711, 712 (Miss. 2000). See also Donald v. Amoco Prod. Co., 735 So.2d 161, 165 (Miss. 1999); Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990). We have said, "[n]otwithstanding our respect for and deference to the trial judge, on matters of law it is our job to get it right. That the trial judge may have come close is not good enough." UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So.2d 746, 754 (Miss. 1987). Under a de novo standard of review, we will affirm only if the moving party can show beyond doubt that the plaintiff failed "to state a claim upon which relief can be granted." Miss. R. Civ. P. 12(b)(6). In order for us to affirm a grant, or reverse a denial, of a Rule 12(b)(6) motion to dismiss, it must be such that no set of facts would entitle the opposing party to relief. Lowe, 760 So.2d at 712.

Walker v. Gallagher, 2006 So.2d (2005-IA-00586-SCT). Like the case at bar, *Walker* involves the right to amend and the relation back of an amendment to change a party defendant.

> This case centers around the relation back of amendments to pleadings under Miss. R. Civ. P. 15(c). Rule 15(a) allows a party to amend a pleading subject to certain timeliness requirements, or otherwise, "by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires." Miss. R. Civ. P. 15(a). An amended pleading which is changing the party against whom a claim is

> asserted relates back to the date of the original pleading under section (c) when certain requirements are met. Miss. R. Civ. P. 15(c). Here the pleading being amended is the complaint, and the party against whom the claim is asserted is Walker, the newly-named defendant. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:
>
> (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and
>
> (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.
>
> Miss. R. Civ. P. 15(c).

Id. In the case *sub judice*, the trial court erred in ruling that the motion for leave to amend had to be filed within 120 days of the filing of the original Complaint, citing *Curry vs Turner*, 832 So.2d 508, 512 (Miss. 2002). This Court correctly held in *Walker* that the defendant to be added merely have notice of and know, or should know, that the action would be brought against it, but for a mistake in identity.

> However, when the amended complaint does change a named defendant, as here, there are two additional requirements: notice and knowledge by the defendant who would be named. Id. These two additional requirements must be met within the Rule 4(h) time period, or 120 days of the original complaint. Brown v. Winn-Dixie Montgomery, Inc., 669 So.2d 92, 94 (Miss. 1996) (citing Schiavone v. Fortune, 477 U.S. 21, 29, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)). Thus, it is not that one of the requirements of Rule 15(c) is that the amendment change a party; instead, it is that only those amended pleadings which do change a party are the pleadings which have three requirements. To pinpoint the rule as it applies to this case, the three requirements of a complaint that changes a named defendant are: (1) the claim in the amended complaint must arise out of the same conduct, transaction, or occurrence as that set forth in the original complaint; (2) the newly-named defendant must have

> received notice of the action within the 120 days; and, (3) the newly-named defendant must have or should have known that an action would be brought against him within the 120 days unless a mistake existed as to the parties' identities.
>
> The first "same conduct, transaction, or occurrence" requirement is clearly met in this case, as both complaints refer to the May 18, 1999, collision. This is not disputed. We must therefore determine if the other two requirements are met: (1) whether Walker received notice of the action; and, (2) whether Walker knew, or should have known, that an action would be brought against him. These tests together essentially ask "whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint." Miss. R. Civ. P. 15(c) (comment). This time period is 120 days after the filing of the complaint. The questions under Rule 15(c)(1) and (2) are then whether Walker received notice of the lawsuit within 120 days after the filing of the original complaint and whether Walker knew or should have known he would be named in the suit within 120 days after the filing of the original complaint. Winn-Dixie Montgomery, 669 So.2d at 94. See also Curry v. Turner, 832 So.2d 508, 513 (Miss. 2002) (considering a case where the motion to amend was filed before the statutory period of limitations had run, but where the court did not grant the motion until after the expiration of the statutory period). If the answer to both is in the affirmative, the amended complaint will relate back to the date of the original complaint, and the suit will not be time-barred by the statute of limitations.

Walker v. Gallagher, 2006 So.2d (2005-IA-00586-SCT). In *Walker*, there was no proof presented of any notice to Walker whatsoever within the 120 days after the original complaint was filed, and, thus, the Court could not assume Walker had notice sufficient to satisfy the rule based solely on speculation. To the contrary, in the case *sub judice*, the record shows that the Chancery Clerk, who serves as Clerk to the Board of Supervisors, the governing authority for the County, was served with formal notice, both on November, 2006 and by service of Summons and Complaint within 120 days of the filing of the suit.

As will be shown below, in Section C, Appellants should have been granted leave to amend to name Pearl River County as a Defendant.

B. The Pearl River County Sheriff's Department is an "Instrumentality" of Pearl River County and, Therefore, is a Proper Defendant under the MTCA[5]

In *Brown v Thompson,* 927 So.2d 733 (Miss. 2006),[6] this Honorable Court held that "sheriff's departments are not political subdivisions within the meaning of the MTCA." *Id.* With all due respect, and in a good faith attempt to establish a new theory of law in the state, which purpose is being made known to the Court at the time of filing the subject Brief, as contemplated by the Litigation Accountability Act of 1988, §11-55-7(g), Appellants respectfully assert that a sheriff's department is an integral part of a County government and, thus, an "instrumentality" of a County, as contemplated in §11-46-1(i). This Court addressed §11-46-1(i) in *Brown,* and conceded that the enumerated bodies listed as examples of bodies politic or bodies corporate constituted a "non-exhaustive list." *Id.* No doubt that the term "instrumentalities" refers to instrumentalities of such bodies politic or bodies corporate, including, explicitly, counties. This Court has interpreted "instrumentalities," as used in §11-46-1(i), previously, and even subsequent to the decision in *Brown.*

> An instrumentality is defined as "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body." Webster's Third New International Dictionary 1172 (3rd ed. 1986). In Watts, this Court concluded that "UAS meets the definition of `State' because it is an instrumentality of UMMC, a state teaching hospital[,]" although this Court placed limitations on its holding, stating:
>
> we are not holding that all medical practice groups are per se instrumentalities of the State. However, where as here the medical practice group was created by UMMC, and is overseen by UMMC, and the purpose is to supplement the income of its faculty; when the day-to-day oversight is left to the department chair, subject to limited oversight by the vice chancellor, and its membership is composed solely of

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[5] *See* Footnote 1

[6] A decision handed down subsequent to the filing of the case *sub judice*, on March 2, 2006.

> full-time UMMC faculty-physicians; where the faculty-physicians can only practice at UMMC approved sites, and the money is distributed on a point system based on factors other than mere patient service, we must conclude that the medical practice group is a State entity.

Bolivar Leflore Medical Alliance v. Williams, 2006 So.2d (2005-IA-00640-SCT), decided October 5, 2006.[7] As stated previously, a sheriff's department is an integral part, an organ, of a county governmental system. As such, it must, respectfully, be considered an "instrumentality thereof." Therefore, Appellants correctly sued the Pearl River County Sheriff's Department pursuant to the MTCA.

C. Alternatively, in the Event Dismissal Was Proper, Appellant Should Have Been Given Reasonable Opportunity to Amend in Accordance with Rule 15.

In *Walker v. Gallagher*, 2006 So.2d (2005-IA-00586-SCT), like the case at bar, this Honorable Court was faced with a matter of first impression on the issue of whether a sheriff's department could be sued separately under the MTCA, and also involving the right to amend and the relation back of an amendment to change a party defendant.

> This case centers around the relation back of amendments to pleadings under Miss. R. Civ. P. 15(c). Rule 15(a) allows a party to amend a pleading subject to certain timeliness requirements, or otherwise, "by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires." Miss. R. Civ. P. 15(a). An amended pleading which is changing the party against whom a claim is asserted relates back to the date of the original pleading under section (c) when certain requirements are met. Miss. R. Civ. P. 15(c). Here the pleading being amended is the complaint, and the party against whom the claim is asserted is Walker, the newly-named defendant. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

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[7]Subsequent to the *Brown* decision.

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

Miss. R. Civ. P. 15(c).

Id. In the case *sub judice*, the trial court erred in ruling that the motion for leave to amend had to be filed within 120 days of the filing of the original Complaint, citing *Curry vs Turner*, 832 So.2d 508, 512 (Miss. 2002). This Court correctly held in *Walker* that, within 120 days of filing the Complaint, the defendant to be added merely have notice of and know, or should know, that the action would be brought against it, but for a mistake in identity. Rule 15(c) mentions nothing of the timing of a motion for leave to amend; only that the notice and actual or constructive knowledge occur within the 120 day period following the filing of the original complaint.

> However, when the amended complaint does change a named defendant, as here, there are two additional requirements: notice and knowledge by the defendant who would be named. Id. These two additional requirements must be met within the Rule 4(h) time period, or 120 days of the original complaint. Brown v. Winn-Dixie Montgomery, Inc., 669 So.2d 92, 94 (Miss. 1996) (citing Schiavone v. Fortune, 477 U.S. 21, 29, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)). Thus, it is not that one of the requirements of Rule 15(c) is that the amendment change a party; instead, it is that only those amended pleadings which do change a party are the pleadings which have three requirements. To pinpoint the rule as it applies to this case, the three requirements of a complaint that changes a named defendant are: (1) the claim in the amended complaint must arise out of the same conduct, transaction, or occurrence as that set forth in the original complaint; (2) the newly-named defendant must have received notice of the action within the 120 days; and, (3) the newly-named defendant must have or should have known that an action would be brought against him within the 120 days unless a mistake existed as to the parties' identities.
>
> The first "same conduct, transaction, or occurrence" requirement is clearly met in this case, as both complaints refer to the May 18, 1999, collision. This is not disputed. We must therefore determine if the other two requirements are met: (1) whether

> Walker received notice of the action; and, (2) whether Walker knew, or should have known, that an action would be brought against him. These tests together essentially ask "whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint." Miss. R. Civ. P. 15(c) (comment). This time period is 120 days after the filing of the complaint. The questions under Rule 15(c)(1) and (2) are then whether Walker received notice of the lawsuit within 120 days after the filing of the original complaint and whether Walker knew or should have known he would be named in the suit within 120 days after the filing of the original complaint. Winn-Dixie Montgomery, 669 So.2d at 94. See also Curry v. Turner, 832 So.2d 508, 513 (Miss. 2002) (considering a case where the motion to amend was filed before the statutory period of limitations had run, but where the court did not grant the motion until after the expiration of the statutory period). If the answer to both is in the affirmative, the amended complaint will relate back to the date of the original complaint, and the suit will not be time-barred by the statute of limitations.

Walker v. Gallagher, 2006 So.2d (2005-IA-00586-SCT). In *Walker*, there was no proof presented of any notice to Walker whatsoever within the 120 days after the original complaint was filed, and, thus, the Court could not assume Walker had notice sufficient to satisfy the rule based solely on speculation. To the contrary, in the case *sub judice*, the record shows that the Chancery Clerk, who serves as Clerk of the Board of Supervisors, the governing authority for the County, was served with formal notice, both on November, 2006 and by service of Summons and Complaint within 120 days of the filing of the suit.

The lower court in the case *sub judice* cited page 512 of the *Curry* decision, which discusses the state of the law prior to the adoption of the Mississippi Rules of Civil Procedure. The Court in *Curry* went on to announce the current state of the law.

> It is noteworthy that Rule 15 makes no reference as to when the relation back provisions in subsection (c) begin to apply once an answer to the complaint has been filed. ***This Court has applied the relation back doctrine to a motion to amend the original complaint filed after the statute of limitations has run.*** See Estes v. Starnes, 732 So.2d 251 (Miss.1999); Womble v. Singing River Hosp., 618 So.2d 1252 (Miss.1993); Parker v. Miss. Game & Fish Comm'n, 555 So.2d 725 (Miss.1989). (Emphasis supplied)

Curry v Turner, 832 So.2d 508, 512-13 (Miss.2002). Because the Plaintiff in *Curry* did not meet the test set forth in Rule 15, the dismissal was proper, although the Court's holding is relevant herein since the record shows that the Rule 15(c) test is met herein.

> The claims against Dent, Trent, and Ladonna Turner involve a claim of negligent entrustment. We are uncertain how long ago the asserted negligent act of entrusting the gun used by Hart Turner to kill Everett Curry was committed or whether that act arose out of the same conduct which killed Everett Curry. We do, however, agree with the circuit judge that the claims the amended complaint brings against the new defendants do not relate back to the original filing of the complaint because the requirements of the second prong---notice and mistake---have not been met by Curry:
>
> > An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:
> >
> > (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and
> >
> > (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.
>
> M.R.C.P. 15(c). The requirements of these two subsections must be fulfilled before the statute of limitations has run or within 120 days of the filing of the original complaint. Brown v. Winn-Dixie Montgomery, Inc., 669 So.2d 92, 94 (Miss.1996) (citing Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)). Soon after the Winn-Dixie Montgomery, Inc. case, Rule 15(c) was changed to embody its holding. ¶ 11. The record does not show that Trent, Dent, and Ladonna Turner were provided any notice of the filing of the original complaint. Curry claims that she first learned she may have a cause of action against them after deposing Ladonna Turner on June 5, 1998. There is no indication in the record the Turners were served with the original complaint or the motion to amend with the amended complaint attached within 120 days after the statute of limitations elapsed. They have suffered no prejudice save the expiration of the time to file suit in the statute of limitations. Furthermore, Trent, Dent, and Ladonna Turner were not being substituted for fictitious parties in the original complaint. The trial court found these facts to be fatal to Curry's claims against them. The trial court's analysis is correct, and the amended complaint against Trent, Dent, and Ladonna Turner does not relate back to

> the original filing of the complaint under Rule 15(c). Since the amended complaint was filed after the statute of limitations ran against these defendants and does not relate back to the filing of the original complaint, the trial court was correct in dismissing these defendants.

832 So.2d at 513-14.

In the case *sub judice*, the court found that both the President and Clerk of the Board of Supervisors were served with the mandated notice-of-claim letter on November 30, 2004, and found that the notices were served on the proper individuals. (R., 101-102, and fn 2 of the Court's *Opinion and Order.*) On September 28, 2005, Plaintiff filed a Complaint naming The Pearl River County Sheriff's Department and John/Jane Does 1-20. (R., pp. 1, 3). Also, on said date, a properly issued summons was served upon Sandra Smith, Deputy Chancery Clerk, ("for David Johnson," Chancery Clerk) and also on said date a copy of the Complaint and summons was mailed to David Johnson, Chancery Clerk. (R., pp. 13-14). Furthermore, on or about January 18, 2006, Carol L. Gypson, Deputy Clerk, acknowledged service of process by mail. (R., p. 18). Thus, the record clearly shows that the County, through the deputy of the Clerk of the Board of Supervisors, received notice on the day suit was filed and also on said date "knew, or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against (it)," as set forth in Rule 15 (c), M.R.C.P. Therefore, an amendment as requested by Plaintiffs below was not "futile" as found by the lower court and, even if dismissal of the Complaint was proper, leave to amend should have been given.

CONCLUSION

The Pearl River County Sheriff's Department is, respectfully, an "instrumentality" of Pearl

River County, Mississippi and, thus, a proper defendant as defined by §11-46-1(i).[8] The stautory definition of Miss. Code Ann. § 11-46-1(i) itself explicitly includes not only political subdivisions as proper Defendants under the MTCA, but also "or other *instrumentality thereof*." It does not appear that the Appellant in *Brown* raised this issue, and this Honorable Court did not address the "instrumentality thereof" language explicitly therein. This Court has, however, addressed said language subsequent to the decision in *Brown*. (*See Bolivar Leflore Medical Alliance, supra)* Thus, it is assumed that the language, and its application to a sheriff's department as an instrumentality of a county was not considered in *Brown*. Once a sheriff's department is analyzed as a "part or organ" of a county, it is clear that it is an "instrumentality thereof," and subject to liability under the MTCA.

Alternatively, in the event dismissal was proper, Appellant should have been given reasonable opportunity to amend in accordance with rule 15. As shown above, facts and circumstances were such that said amendment would have been timely and would have related back to the filing of the original complaint.

In conclusion, the subject appeal should be reversed and remanded.

RESPECTFULLY SUBMITTED, 26th day of January, 2007.

ANGELIA MIEGER, DONALD MIEGER AND ANGELIA MIEGER AS NEXT FRIEND OF HER CHILDREN, ARIELLE MIEGER AND ANDREW MIEGER, APPELLANT'S

BY: _____
Michael C. Barefield, Miss Bar [redacted]

[8] *See* Footnote 1.

CERTIFICATE OF SERVICE

I, MICHAEL C. BAREFIELD, do hereby certify that I have sent a copy (via electronic mail via U. S. First Class Mail, postage prepaid, on January 26, 2007, of the foregoing document to:

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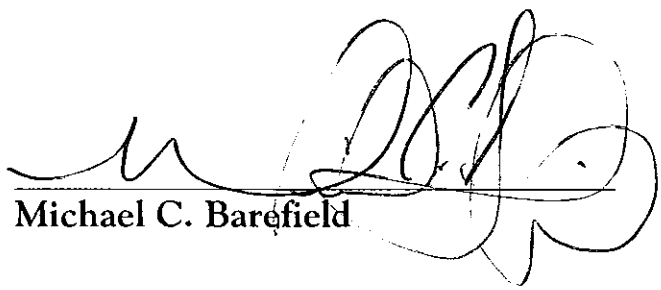

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