IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-TS-00117

MS COMP CHOICE, SIF. — APPELLANT

VS.

CLARK, SCOTT & STREETMAN, P.A. — APPELLEE

APPEAL FROM THE CIRCUIT COURT
FOR THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

BRIEF OF THE APPELLEE, CLARK, SCOTT & STREETMAN, P.A.

DAVID W. MOCKBEE, MS BAR [redacted]
MOCKBEE HALL & DRAKE, P.A.
Lamar Life Building, Suite 1000
317 East Capitol Street
Jackson, MS 39201
Telephone: (601) 353-0035
Facsimile: (601) 353-0045

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Joel W. Howell, III, Esquire, Attorney of Record for Plaintiff/Appellant, MS Comp Choice, SIF.

2. Safety Risk Services, Inc., original Plaintiff.

3. MS Comp Choice, SIF., Plaintiff/Appellant.

4. David W. Mockbee, Esquire, Attorney of Record for Defendant/Appellee, Clark, Scott & Streetman, P.A.

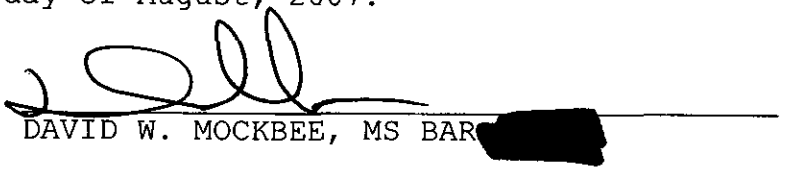
5. David B. Denison, Esquire, Attorney of Record for Defendant/Appellee, Clark, Scott & Streetman, P.A.

6. Clark, Scott & Streetman, P.A., Defendant/Appellee.

7. Scott, Sullivan, Streetman & Fox, P.A., the successor in interest to Defendant/Appellee, Clark, Scott & Streetman, P.A.

8. Honorable W. Swan Yerger, Hinds County Circuit Judge.

This the 17th day of August, 2007.



DAVID W. MOCKBEE, MS BAR [redacted]

OF COUNSEL:
MOCKBEE HALL & DRAKE, P.A.
Lamar Life Building, Suite 1000
317 East Capitol Street
Jackson, MS 39201
Telephone: (601) 353-0035
Facsimile: (601) 353-0045

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be of any assistance in this case where the material facts are undisputed and the applicable Mississippi law is clear.

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IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-TS-00117

MS COMP CHOICE, SIF. APPELLANT

VS. TRIAL COURT NO. 251-05-898 CIV

CLARK, SCOTT & STREETMAN, P.A. APPELLEE

STATEMENT OF ISSUES

MS Comp Choice, SIF.'s ("Comp Choice") STATEMENT OF ISSUES contains an incorrect statement of the pleadings in the Trial Court in reciting issues 1 and 2.

As to the events underlying the appeal, the Amended Complaint does not note an assignment to Comp Choice of Safety Risk Services, Inc.'s ("Safety Risk") interest in the malpractice claim against Clark, Scott & Streetman, P.A. ("CSS"). The "Amended Complaint" did much more than substitute an assignee for the assignor of a Complaint as the real party in interest. The "Amended Complaint" asserted a claim for a new and different party plaintiff alleging its own damage from CSS's alleged malpractice.

STATEMENT OF THE CASE

Comp Choice's STATEMENT OF THE CASE does not set out all of the relevant proceedings and facts, so this supplemented STATEMENT OF THE CASE is provided.

1. The Nature of the Case, the Course of Proceedings, Disposition in the Court Below.

Safety Risk, a Mississippi corporation, as plaintiff, filed this legal action against CSS on September 14, 2005, Safety Risk

Services, Inc. v. Clark Scott & Streetman, in the Circuit Court for the First Judicial District of Hinds County, Mississippi, Civil Action No. 251-05-898 CIV ("Complaint"). (R. 3-14; Appellee's R.E. at Tab 1).[1] Safety Risk did not serve the Complaint on CSS within the 120 days in which to effect service per Miss. R. Civ. P. 4(h) which expired on January 12, 2006.

On January 9, 2006, Comp Choice, as the sole plaintiff, filed a pleading styled "Amended Complaint," ("Amended Complaint"). (R. 9-14; Appellee's R.E. at Tab 2). Safety Risk is not a party plaintiff to the "Amended Complaint." (R. 9; Appellee's R.E. at Tab 2).

The "Amended Complaint" was filed by Comp Choice, on its own behalf and as assignee of Elie and Francine Grinstead, against CSS for alleged legal malpractice stemming from CSS's representation of Comp Choice in defense of a worker's compensation claim brought against Comp Choice and Safety Risk by Elie Grinstead. (R. 9-14; Appellee's R.E. at Tab 2).

CSS filed a Motion to Dismiss the Complaint of Comp Choice asserting that the "Amended Complaint" by Comp Choice was a new cause of action, being asserted by a new party, which did not relate back to the original Complaint which had never been served

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[1] Citations to the Record are referenced as "R.___." Appellant's Record Excerpts are referenced as "Appellant's R.E.___." Appellee's Record Excerpts are referenced as "Appellee's R.E.___."

and which, therefore, was void because the statute of limitations had run before the "Amended Complaint" was served on CSS.

On December 15, 2006, Circuit Judge Swan W. Yerger issued a ruling, converting CSS's Motion to Dismiss to a Motion for Summary Judgment and holding that CSS was entitled to judgment as a matter of law because the "Amended Complaint" was a new complaint filed outside the statute of limitations. (R. 11; Appellant's R.E. Tab II). Judge Yerger subsequently entered a Memorandum Opinion and Order and a Summary Judgment on December 29, 2006, in accordance with his prior ruling. (R. 111-115, 116; Appellant's R.E. Tabs III and IV).

2. Statement of Relevant Facts.

Comp Choice and Safety Risk, Comp Choice's Third Party Administrator, retained CSS to defend both of them in a worker's compensation dispute, styled Grinstead v. Monticello Forest Products Corp. and Mississippi Forest Related Workers' Compensation Group, originally before the Mississippi Workers' Compensation Commission, and subsequently in the Circuit Court of Lawrence County, Cause No. 22002-0122 (the "Underlying Litigation"). (R. 4; Appellee's R.E. Tab 1). Comp Choice claimed that CSS committed legal malpractice when CSS did not take an appeal, as allegedly instructed by Comp Choice, of the Circuit Court of Lawrence County's adverse final Order and decision. (R. 11; Appellee's R.E. Tab 2 ¶8).

The Order of the Circuit Court of Lawrence County central to this claim was handed down on September 18, 2002. (R. 24-32; Appellee's R.E. Tab 4, pp. 24-32).

A notice of appeal of the Order would have had to have been filed within thirty (30) days of the decision, or by no later than October 18, 2002. Miss. R. App. P. 4(a).

As an appeal was not taken, the circuit court's ruling became final on October 18, 2002. Thus, the earliest possible date that the legal malpractice claim could have accrued was October 18, 2002. Furthermore, this was also the date that CSS's representation of the defendants in the Underlying Litigation concluded as a final judgment in the matter had been entered.

On November 8, 2002 Joey Giordano of Comp Choice was served with a complaint for a bad faith action that arose subsequent to the Underlying Litigation, which alleged that the defendants to the Underlying Litigation had acted in bad faith when they denied the workers' compensation claim of Elie Grinstead. (R. 33; Appellee's R.E. Tab 4). The bad faith claim was dependent in part on the Underlying Litigation having reached final disposition in favor of Elie Grinstead, and thus the receipt of the complaint for bad faith put Comp Choice on notice that the underlying case was over and any attempt to appeal had expired.

On November 11, 2002, CSS sent correspondence to representatives of Comp Choice regarding the final payment and release of the claim in the Underlying Litigation. CSS sent a

standard release for their clients' review by fax correspondence from Brian D. Mayo, of CSS, to Joey Giordano, of Comp Choice. (R. 34-39; Appellee's R.E. Tab 4). This correspondence once again should have put Comp Choice on notice that the appeal had not been taken and the Underlying Litigation had concluded in favor of Elie Grinstead.

Safety Risk filed the "Complaint" in this action on September 14, 2005 solely on behalf of Safety Risk as a legal malpractice complaint against CSS. (R. 3; Appellee's R.E. Tab 1). Safety Risk never served CSS. The 120 days in which to effect service per Miss. R. Civ. P. 4(h) expired on January 12, 2006. To this day, CSS has never been served with a copy of the Complaint.

On November 10, 2005[2] at the latest, the statute of limitations expired as to any claim that Safety Risk or Comp Choice may have had against CSS for its representation of Safety Risk and Comp Choice in the Underlying Litigation.

On January 9, 2006, Comp Choice filed the "Amended Complaint" for the first time naming Comp Choice as plaintiff, for itself and as assignee of Elie W. Grinstead and Francine Grinstead. (R. 9-14; Appellee's R.E. Tab 2). Safety Risk, the plaintiff under the Complaint, was not named as a party to the "Amended Complaint" (R.

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[2] This date is three years from CSS's November 11, 2002 letter to Comp Choice, transmitting the release (R. 34-39; Appellee's R.E. Tab 4, pp. 35-39) which, as stated herein-above, gives Safety Risk and Comp Choice the benefit of the latest date that the three year statute of limitation expired.

9; Appellee's R.E. Tab 2 ¶¶1-2) and no claim was asserted by Comp Choice as assignee of the Grinsteads.

On January 10, 2006, Comp Choice purportedly served the "Amended Complaint" on CSS. (R. 17-18; Appellee's R.E. Tab 3).[3] This was the first and only attempt by Safety Risk or Comp Choice to put CSS on notice of a claim by anyone against it arising from CSS's legal representation of the defendants to the Underlying Litigation.

SUMMARY OF THE ARGUMENT

All that Safety Risk and Comp Choice had to do to avoid this appeal was to serve CSS with the Complaint before January 12, 2006[4] per Rule 4(h) Miss. R. Civ. P. For some inexcusable reason, this was not done.

Counsel for Safety Risk and Comp Choice suggest incredibly that service of the Complaint by Safety Risk was not made in the interest of judicial economy. Instead, counsel filed an "Amended Complaint" for Comp Choice, a new party plaintiff, asserting for the first time the claims of Comp Choice rather than those of Safety Risk asserted in the original Complaint. This purported attempt at "judicial economy" has now resulted in the filing of:

1. CSS's Motion to Dismiss and Memorandum in Support

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[3] The adequacy of service of process is not an issue on this appeal from entry of Summary Judgment in favor of CSS, although the adequacy of service was contested below.

[4] January 12, 2006 is 120 days from September 14, 2005 - the date Safety Risk sued CSS.

2. Comp Choice's Response

3. CSS's Reply

4. Appellant's Brief on Appeal

Appellee's Brief

Appellant's Reply Brief to come

all of which could have been avoided by the simple but absolutely essential act of timely serving the Complaint by January 12, 2006, as required by the Mississippi Rules of Civil Procedure.

The only real issue on this appeal is whether Mississippi law and rules of procedure permit a change in the party plaintiff by "Amended Complaint" when the Complaint was never served and after the applicable statute of limitations covering the claims asserted in both the Complaint and in the "Amended Complaint" has run prior to the service of the "Amended Complaint."

As discussed in detail below, Mississippi law and procedure do not permit such a pleading process to circumvent the applicable statute of limitations. As Safety Risk and Comp Choice both failed to timely effect service of process, this action must be dismissed as too late under the applicable 3-year statute of limitations, Miss. Code Ann. §15-1-49.

ARGUMENT

I.

Standard of Review

The standard of review is de novo, Bedford Health Properties, LLC v. Estate of Williams, 946 So.2d 335 (Miss. 2006), with

affirmance proper in this case where there has been no misapplication of the law by the Trial Court and where there is no genuine issue of material fact.

As this Court has previously stated:

> The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense...the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact. To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise the decision is affirmed.

Bedford Health Properties, 946 So.2d at 340-41 (internal citations omitted)(emphasis added).

First, Comp Choice erroneously argues that the standard of review is heightened in this instance because the Trial Court's Memorandum and Opinion were prepared by CSS. What Comp Choice fails to point out is that the Trial Court's underlying ruling on CSS's Motion to Dismiss contains the Court's own words and specifically directed the attorneys for CSS to submit "1)a proposed opinion/order and 2)a separate Summary Judgment dismissing with prejudice the subject action." (R. 110; Appellant's R.E. Tab 2). This directive was followed and the Court's Memorandum Opinion and Order and Summary Judgment are consistent with the Court's self-drafted ruling on Defendant "CSS" Motion to Dismiss.

"The Mississippi Supreme Court has consistently held that a trial court can adopt verbatim, in whole or part, the findings of fact and conclusions of law submitted by a party." Stark v. Anderson, 748 So.2d 838, 841 (Miss. Ct. App. 1999) (citing Chamblee v. Chamblee, 637 So.2d 850, 858 (Miss. 1994); Omnibank v. United Southern Bank, 607 So.2d 76, 83 (Miss. 1992); Rice Researchers, Inc. v. Hiter, 512 So.2d 1259, 1264-65 (Miss. 1987)).

Second, Comp Choice's statement that the Trial Court's "verbatim adoption of the opinion submitted by defense counsel further supports the strictest standard of review," is erroneous. In support, Comp Choice cites Miss. Dep't of Transp. v. Johnson, 873 So.2d 108, 111 (Miss. 2004) and Holden v. Frasher-Holden, 680 So.2d 795, 798 (Miss. 1996).

While not specifically overruling Johnson and Holden, the Mississippi Court of Appeals in Miss. Dep't of Wildlife, Fisheries & Parks v. Brannon, 943 So.2d 53, 57 (Miss. Ct. App. 2006), stated that Brooks v. Brooks, 652 So.2d 1113, 1118 (Miss. 1995), the case Johnson and Holden rely upon, made an inaccurate statement of law. Citing Rice Researchers, Inc. v. Hiter, 512 So.2d 1259, 1265 (Miss. 1987), the Court of Appeals in Brannon held the de novo standard of review was not the proper standard of review for a trial judge's opinion that adopted verbatim a party's findings of fact or conclusions of law. The proper standard in this specific situation is to:

> analyze[] such findings with greater care, and the evidence is subject to heightened scrutiny . . . [and]

> view the challenged findings and the record as a whole with a more critical eye to ensure that the trial court has adequately performed its judicial function.

Brannon, 943 So.2d at 59. In the case at bar, the findings and evidence are not in dispute, just the proper application of the law. Therefore, the review standard remains de novo.

II.

Issues

ISSUE 1: THE TRIAL COURT PROPERLY REJECTED THE "AMENDED COMPLAINT" FILED BY COMP CHOICE BECAUSE IT ASSERTED A "NEW CAUSE OF ACTION" AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED.

Contrary to Comp Choice's Statement of Issues 1. and 2., this case is not about a Rule 15 "relation back" or Rule 17 substitution of Comp Choice as "the real party in interest" but rather this case is about the legal effect of a separate and distinct cause of action being filed by a new party plaintiff as a purported "Amended Complaint," when the original Complaint was never served and where the new second party plaintiff asserted its own cause of action for the first time after the statute of limitations has run on both party-plaintiffs' claims.

On September 14, 2005, a Complaint was filed by Safety Risk against CSS for alleged damage to Safety Risk proximately caused by CSS's alleged legal malpractice in representing Safety Risk. That Complaint was never served on CSS, and prior to the running of the statute of limitations, there was no attempt made to put CSS on notice that a claim was being asserted against it due to its

representation of Safety Risk and Comp Choice in the Underlying Litigation.

Pursuant to Miss. R. Civ. P. 4(h), as of the expiration of the 120 days from filing of the Complaint, dismissal of the Complaint was automatic and the pleading became invalid and nullified. Once the 120 days prescribed for service by Miss. R. Civ. P. 4(h) expired, the original Complaint was void and "legally comatose, robbed of all its latent powers to command action." King v. American RV Centers, Inc., 862 So.2d 558, 563 (Miss. Ct. App. 2003)(overruled in part by, Wilner v. White, 929 So.2d 315, 320 (Miss. 2006)).[5]

Only after the statute of limitations had run on any claim against CSS for legal malpractice arising out of the Underlying Litigation, Comp Choice filed an "Amended Complaint" not naming Safety Risk as a party plaintiff, but instead listing Comp Choice as the only plaintiff asserting a cause of action against CSS on behalf of Comp Choice directly and as an assignee of the rights of Elie Grinstead and Francine Grinstead (the "Grinsteads").[6]

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[5] In Wilner, the Mississippi Supreme Court held that, "To the extent that *King* could be interpreted to allow a party to split causes of action, *King* is expressly overruled." Wilner, 929 So.2d at 320. The Court held that the incorrectly titled "amended complaint" could not be converted by the court to a new, original complaint. Instead, the Court dismissed the pleading as barred by the statute of limitations and held, "[W]e do not agree that the amended complaint can be treated, for purposes of the added parties, as an original complaint." Id. at 321.

[6] Numerous federal courts have ruled that an amended

(continued...)

A. Miss. R. Civ. P. 15 does not apply.

(1) Because the Complaint was never served.

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[6] (...continued)
complaint does not revive a complaint that was never served, just as the Trial Court ruled in this case, but under Fed. R. Civ. P. Rule 4(j) (now Rule 4(m) which is the same as Miss. R. Civ. P. Rule 4(h)). As stated in Crowder v. True, 1993 U.S. Dist. LEXIS 8620 (D. Ill. 1993):

> The proper procedure is to effect service upon the original complaint before attempting an amendment. See Del Raine v. Carlson, 826 F.2d 698, 705 (7th Cir. 1987) (pro se prisoner's complaint dismissed pursuant to Rule 4(j) when defendants not served within time limit of original complaint); Excalibur Oil, Inc. v. Gable, 105 F.R.D. 543, 544 n.4 (N.D. Ill. 1985)(Shadur, J.) (proper procedure is to effect service under original complaint, then to amend complaint). See also Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985) (desire to amend complaint did not toll limitation for service under 4(j)); Leonard v. Stuart-James Co., 742 F. Supp. 653, 662 (N.D. Ga. 1990) (collecting cases); Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 668 (W.D. Mo. 1990), aff'd, 932 F.2d 697 (8th Cir. 1991); Baden v. Craig-Hallum, 115 F.R.D. 582, 586 n.3 (D. Minn. 1987).

Id. at nt. 1. See also Bolden v. Topeka, 441 F.3d 1129, 1148-49 (10th Cir. 2006)(the 120 day period of 4(m) is not restarted by the filing of an amended complaint except to those newly added defendants of the amended complaint thus preventing a plaintiff from continually amending a complaint to delay service).

> The logic of these cases is clear - if an amendment were allowed to substitute for the original for service, plaintiffs would have no incentive to serve the original complaint within the 120-day period. Therefore, even though the amended complaint was served within 120 days of its filing, service is not sufficient.

Leonard v. Stuart-James Company, Inc., et al., 742 F.Supp. 653, 667 (N.D. Ga. 1990).

While Comp Choice's pleading was styled "Amended Complaint," it necessarily cannot be an amended complaint because there is not a served complaint for it to amend. Miss. R. Civ. P. 15. Rule 15 states in pertinent part, "A party may amend a pleading as a matter of course at any time before a responsive pleading is served." Implicit in this language is the assumption that something has happened to trigger the requirement that a responsive pleading be filed. The only thing that can trigger such a requirement is service of a complaint or some other similar pleading. Merely filing a pleading and not serving it on the defendant does not necessitate a response by the defendant. Thus, Rule 15 is inapplicable when an initial complaint has not been served.

As held by the Mississippi Court of Appeals:

> Our rules of civil procedure contemplate the filing of an amended complaint in only two instances: when a complaint has been timely served but not answered, and when a complaint has been timely served and answered. M.R.C.P. 15. In the former situation, the amended complaint may be filed as a matter of course without the consent of either the court or the opposing party. In the latter, consent of the court must be acquired. In both of these instances, the complaint necessarily would have been served within either the initial 120 days permitted by Rule 4(h) or within an extension granted by the court upon a showing of good cause for not having effectuated service within the initial 120-day period.

King, 862 So.2d at 563 (emphasis added).

Consequently, Comp Choice's "Amended Complaint" cannot relate back to Safety Risk's Complaint because there is not a properly served complaint to relate back to, and as held in King, service of

a complaint is "necessary" for the filing of an amended complaint. Id.

Furthermore, the "Amended Complaint" makes no reference to the original complaint nor is it dependent in any way for completeness on the original complaint. In fact, there is a complete substitution of the party plaintiff from the Complaint to the "Amended Complaint." Thus, the two complaints are necessarily two independent causes of action brought by different party plaintiffs that are separate and distinct from one another.

(2) Because the "Amended Complaint" asserts a new cause of action.

Also, pursuant to Miss. R. Civ. P. 15, the "Amended Complaint" of Comp Choice cannot relate back to the original Complaint because it asserts a new cause of action for a new party. In Bracey v. Sullivan, 899 So.2d 210, 214 (Miss. Ct. App. 2005), the Court of Appeals denied a motion to amend where an originally named plaintiff sought to amend a complaint against the originally named defendant to add "a new and different cause of action" after the statute of limitations had run on the new cause of action. When examining the "relation back" requirement of Rule 15, the Court of Appeals held, "the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading." Id. at 212-13 (emphasis added). Quoting the United States Supreme Court's interpretation of the relation back doctrine, the Court of Appeals also held:

> But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is that, as the running of the statute is interrupted, by suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged by way of amendment, which are part thereof. But where the cause of action relied upon in an amendment is different from that originally asserted, the reason of the rule ceases to exist and hence the rule itself no longer applies.

Id. at 213 (quoting Union Pac. Ry. Co. v. Wyler, 158 U.S. 285, 296-97 (1895))(emphasis added). See also, King v. Otasco, 861 F.2d 438, 441 (5th Cir. 1988)("When suit alleges several distinct causes of action, even if they arise from a single event, applicable limitations period must be determined by analyzing each cause of action separately. . . . Plaintiffs, of course cannot be allowed to obtain trials for . . . claims after statute of limitations has barred them merely by engaging in artful pleading"); Powe v. Byrd, 892 So.2d 223, 226 (Miss. 2004)(dismissing complaint for failure to serve pursuant to Rule 4(h) and holding, "inability to refile the suit because of statute of limitations does not bar dismissal").

Clearly, in its "Amended Complaint," Comp Choice sought to bring a new and different cause of action by a separate and distinct party plaintiff after the running of the statute of limitations. Furthermore, there was never a "suit and summons" sufficient to put CSS on notice of this or any cause of action prior to the expiration of the statute of limitations. Thus, the "Amended Complaint" does not relate back to the original Complaint. Bracey, 899 So.2d at 212-13.

Furthermore, in addition to being outside the scope of Miss. R. Civ. P. 15, to allow the "Amended Complaint" to stand as such would prejudice CSS and lead to absurd results. In essence, Comp Choice would force this Court to hold that one party plaintiff can toll the running of the statute of limitations for a separate and distinct party plaintiff, by filing a complaint within the statute of limitations, never serving that complaint and never putting the potential defendant on notice of a claim against it, and then substitute an entirely different party, with separate and distinct rights and a separate and distinct cause of action, after the statute of limitations had run. Allowing one party to toll the statute of limitations for another party, without any notice to a defendant, would clearly run contrary to the purpose of the statute of limitations. See, Harrison Enterprises, Inc. v. Trilogy Communications, Inc., 818 So.2d 1088, 1095 (Miss. 2002)("these acts were designed to discourage lawsuits. The law is created for the watchful and not for the negligent. Moreover: The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time.")

Likewise, such a ruling would run contrary to this Court's long standing precedent that Rule 15's relation back provision is inapplicable when the defendant is not put on notice of the new claims being asserted by an amended complaint prior to expiration of the statute of limitations. Bracey, 899 So.2d at 212-13.

Comp Choice, apparently realizing that its action is barred, attempts to re-define itself an assignee of the rights of Safety Risk. However, this directly contradicts Comp Choice's own statement in the "Amended Complaint" that:

> Plaintiff MS Comp Choice, SIF is a self insurer under the applicable laws of the State of Mississippi and an assignee of any and all interest of Elie W. Grinstead and Francine Grinstead against MS Comp Choice, SIF, Safety Risk Services, Inc., Monticello Forests Products, Inc., Evans/Giordano, Inc. and those in privity with them and Safety Risk Services, Inc.

(R. 9; Appellee's R.E. Tab 2 ¶1).

Furthermore, such argument is belied by the "Amended Complaint" statement that CSS "was retained by Mississippi Comp. Choice SIF to represent Mississippi Comp. Choice SIF and its third party administrator, Safety Risk . . ." (R. 10; Appellee's R.E. Tab 2 ¶6). Thus, based on its own allegations, Comp Choice has its own attorney-client relationship with CSS and if there was in fact malpractice on the part of CSS, then Comp Choice would have its own cause of action against CSS and Comp Choice doesn't gain anything by being an assignee of Safety Risk.

Simply put, the reason Comp Choice did not define itself as an assignee of Safety Risk at the time it filed its "Amended Complaint" is because Comp Choice was attempting to assert its own cause of action based on its contract with CSS. It was not until Comp Choice realized that its claim was time-barred that it attempted to "change hats" and redefine itself as an assignee of

Safety Risk. This Court should not entertain such defective pleadings. King v. Otasco, 861 F.2d 438, 441 (5th Cir. 1988).

The case at bar is also not like White v. Steak & Ale of Little Rock, Inc., 839 F.Supp. 23, 25 (E.D. Ark. 1993), cited by Comp Choice, in which the defendant was served with the amended complaint within ten days of the date of the filing of the original complaint. In this case, had CSS been served within ten days of the filing of the original Complaint, there would be no statute of limitations issue.

Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986), also cited by Comp Choice, is inapplicable given the clear Mississippi Supreme Court pronouncements on this issue.

B. Miss. R. Civ. P. Rule 17 does not apply.

Advance Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11 (2d Cir. 1997) cited by Comp Choice is inapposite as that case did not deal with substitution of the plaintiff where there had never been proper service of process by the original plaintiff. The court specifically held in Advance Magnetics that it did not "see any unfairness to defendants in allowing substitution . . . ." Id. at 21.

As stated in Citizens National Bank v. Dixieland Forest Products, LLC, 935 So.2d 1004, 1013 (Miss. 2006), also cited by Comp Choice, Rule 17 allows only the real party in interest to prosecute its claims. In this case, there is no suggestion in the Amended Complaint that Comp Choice is the "only" real party in

interest as to the allegations set forth in the original Complaint by Safety Risk.

Similarly, Scheuffler v. General Host Corp., 126 F.3d 1261, 1269-70 (10th Cir. 1997), cited by Comp Choice, there was no statute of limitations or service issue like that in the case at bar. Therefore, Scheuffler provides no guidance in this instance.

The issue here is not the right to amend up to the point that an answer is filed but, rather, the obligation to sue within the applicable statute of limitations.

Comp Choice suggested at Page 7 of its Brief that "if the plaintiff had served the original Complaint and forced the defendant to move for the naming of the real party in interest, the Amended Complaint would have related back to the original filing and would not have been barred by the statute of limitations." That is the essence of the fatal defect in the pleadings in this case; that is, the plaintiff did not serve the original Complaint and, therefore, there was no opportunity much less obligation on the part of CSS to move for the naming of the real party in interest prior to the expiration of the applicable statute of limitations. Therefore, it is wholly without merit for Comp Choice to suggest that "it is inconsistent with the law and justice for the Circuit Court to hold that the plaintiff's more expeditious amendment resulted in the destruction of its case." (Appellee's Brief at p. 7).

This very appeal results from the failure of either Safety Risk or Comp Choice to act expeditiously in any regard. First, in Safety Risk not bothering to serve its Complaint and, then, Comp Choice in not filing its purported "Amended Complaint" within the statutory time period.

At Pages 16-17 of its Brief, Comp Choice argues that because the original Complaint outlined an identical transactional nexus (identical facts and claims, but also concerning the same entities in the same representative capacities as the original Complaint), CSS was placed on notice of the subject dispute and the amendment relates back to the original pleading. How can Comp Choice make this statement when the whole issue in this case is the failure to timely serve the Complaint and the purported "Amended Complaint" which prevented CSS from being "placed on notice of the subject dispute and the amendment relates back to the original pleading."

Similarly, the due process distinction that Comp Choice tries to make in its Brief at Page 17 that neither the claims nor the party against whom they were originally asserted were changed is equally invalid since the problem in this case is that notice of that original claim was not timely provided.

ISSUE 2: THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS ALL CLAIMS ASSERTED IN THE "AMENDED COMPLAINT" WERE FILED AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED.

The "Amended Complaint" alleges CSS's failure to appeal the adverse Order of the Circuit Court as the only act or omission by

CSS constituting malpractice. Specifically, in its "Amended Complaint," Comp Choice alleges:

> 8. The employer and carrier prosecuted their defense to Mr. Grinstead's Worker's Compensation claim on that basis through and including an adverse decision by the Circuit Court of Lawrence County. Plaintiff herein had then directed Clark, Scott & Streetman to prosecute an appeal of the foregoing adverse decision which they failed to do to the detriment of Plaintiff.
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>
> 15. Defendant failed to exercise reasonable care in his actions and inactions in prosecuting the aforementioned suit and allowing the statute of limitations to expire, which actions and inactions constitute negligence on the part of the defendant.
>
> • • •
>
> 18. At all time [sic] relative hereto, defendant occupied the position of a fiduciary to plaintiff and failed to carry out the fiduciary duties to plaintiff in the aforementioned suit.

(R. 11-13; Appellee's R.E. Tab 2) (emphasis added).

The statute of limitations for a cause of action based on legal malpractice is three (3) years. Hymes v. McIlwain, 856 So.2d 416, 419 (Miss. Ct. App. 2003). The "discovery rule" is applied in legal malpractice claims, and thus the statute of limitations begins to run on the date the client learns or through exercise of reasonable diligence should have learned of the alleged negligence of his attorney. Hymes, 865 So.2d at 419; Smith v. Sneed, 638 So.2d 1252, 1257 (Miss. 1994).

In the matter at hand, it is undisputed that the Underlying Litigation was finally concluded on October 18, 2002, thirty (30) days after the Circuit Court's Order. (R. 24-32; Appellee's R.E.

Tab 4). It is further undisputed that Comp Choice had knowledge of the alleged failure to appeal no later than November 11, 2002. (R. 34-39; Appellee's R.E. Tab 4). Any alleged injury was the cause of that "single, one-time act." Smith, 638 So.2d at 1252. Clearly, the representation as to the specific matter of the worker's compensation claim terminated on October 18, 2002 when the litigation reached its final disposition, and any alleged communications between CSS and Comp Choice after that time were in the nature of "winding down" the relationship. Kindle v. Morisset, Schlosser, Ayer & Jozwiak, 217 F.3d 602, 605 (8th Cir. 2000).

On November 8, 2002, agents of Comp Choice were served with a complaint filed by the Grinsteads for bad faith denial of their worker's compensation claim. (R. 33; Appellee's R.E. Tab 4). This bad faith complaint was based in large part on final disposition of the Underlying Litigation in favor of Elie Grinstead and against Comp Choice. Therefore, through the exercise of reasonable diligence, by November 8, 2002, Comp Choice should have known that the act which they claim constitutes legal malpractice had occurred; namely, the appeal had not been taken.

Finally, by November 11, 2002, agents of Comp Choice and CSS were discussing final payment and release of the workers' compensation claim. (R. 34-39; Appellee's R.E. Tab 4). It goes without saying that Comp Choice must have been aware at that time that there had been a final disposition of the Underlying Litigation, as the terms of payment of the workers' compensation

benefits were being negotiated. Therefore, at the very latest, November 11, 2002 was the date that Comp Choice learned, or through exercise of reasonable diligence should have learned of the alleged negligence of CSS.

Therefore, any claim that Comp Choice is attempting to assert which took place after the cessation of litigation on October 18, 2002 and/or after November 11, 2002 (the latest possible date that Comp Choice had knowledge of the alleged failure to appeal) is irrelevant to the claim for the alleged failure to appeal and the statute of limitations applicable to that claim.

Thus, giving Comp Choice every benefit of the doubt, at the very latest, the statute of limitations for the alleged failure to appeal began to run on November 11, 2002 and expired on November 10, 2005, three (3) years after Comp Choice knew or should have known of the alleged legal malpractice for failure to appeal.

The "Amended Complaint," which as shown is a new complaint in and of itself, was not filed until January 9, 2006. This was the first time that Comp Choice asserted a cause of action against CSS. Per the statute of limitations, Comp Choice had three (3) years to assert a cause of action against CSS. The statute of limitations expired at least by November 10, 2005, if not earlier. Comp Choice did not file its "Amended Complaint" until more than three (3) years after the statute of limitations had expired. Thus, the "Amended Complaint" of Comp Choice is barred by the statute of limitations.

In a transparent attempt to avoid this pitfall, at Page 6 of its Brief, Comp Choice states "Claims based on the Clark firm's omissions to keep its workers' compensation clients informed about Grinstead's needs would not have expired until September of 2006." This contention is most telling as it evidences the difference between the original Complaint and the purported "Amended Complaint." In its Statement of the Case, Comp Choice references the allegation that "the Clark firm also failed to timely advise the workers' compensation defendants concerning the proper payment of benefits to Grinstead." (R. 67-72; Appellee's R.E. Tab 5). For these deficiencies, the Clark firm was discharged in September of 2003.

A review of the Record reveals that this allegation is taken from an Affidavit attached to Comp Choice's Response to Motion to Dismiss (R. 67-70; Appellee's R.E. Tab 5), not from any allegation contained in the Complaint or "Amended Complaint" and, therefore, it is irrelevant. Any attempt by Comp Choice to now re-plead their claim for malpractice to extend beyond the alleged failure to appeal is disingenuous and should be rejected.

The allegations in the Complaint and "Amended Complaint" are clearly limited to CSS's representation as defense counsel in the underlying workers' compensation case and to the alleged failure to appeal. As such, the asserted claim for malpractice is limited to the Underlying Litigation. "The legal presumption is, of course, that an attorney-client relationship terminates once the case or

controversy in which the attorney was originally employed is resolved by entry of a final judgment." Hill v. State, 494 S.E.2d 661, 663 (Ga. 1998)(citing 7A C.J.S. Attorney & Client § 226, p. 407 (Rev. 1980)).

Furthermore, this Court has previously refused to apply the "continuing tort" theory to attorney malpractice claims and has held that a plaintiff can only recover for a "continuing tort" in "situations where the defendant commits repeated acts of wrongful conduct, not where harm reverberates from a single, one-time act or omission." Smith, 638 So.2d at 1255 (citing Stevens v. Lake, 615 So.2d 1177, 1183 (Miss. 1993))(emphasis added).

In Stevens, the former client alleged damages due to an attorney's failure to record a trust. 615 So.2d at 1252. The client alleged that because it had been denied the benefit it would have incurred through the trust, it suffered financial loss each year that eventually ended in bankruptcy. Id. The client maintained that each year's loss was a continuing injury and thus the statute of limitations should be stayed under the continuing tort theory. Id. This Court rejected that argument and held, "A 'continuing tort' sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continuing ill effects from an original violation." Id. at 1183 (emphasis in original).

In Stevens, this Court also considered the applicability of the "continuous representation rule" to a legal malpractice claim

and held, "the cause of action ... accrue[s] [when] the attorney's representation concerning a particular matter is terminated." Id. at 1182 (emphasis original) (internal citations omitted). This Court further held, "The inquiry is not whether an attorney-client relationship still exist but when the representation of the specific matter terminated .... Representation on unrelated matters does not suffice to toll the running of the statute of limitations." Id. (internal citations omitted).

Similarly, in Smith, the former client alleged malpractice against his former attorney for instructing him to plead guilty to manslaughter before receiving and examining an autopsy that had been performed. 638 So.2d at 1252. The autopsy showed the deceased had died of natural causes and the client was able to use the autopsy to obtain his release from prison, but only after serving four (4) years. Id. The attorney argued that the statute of limitations began to run from the point the client learned of the autopsy and its contents. Id. The client argued that the cause of action did not accrue until he was released from prison and suffered his last injury due to the alleged malpractice. Id. at 1255. This Court rejected the client's argument and held, "[T]his harm did not arise from any repeated wrongful conduct by Sneed, but rather from the single, one-time act of Sneed's failure to obtain a copy of the autopsy report." Id. at 1256.

In the present matter, as in Smith, the alleged injury stems from "the single, one-time act" of CSS's alleged failure to appeal

the Order of the Lawrence County Circuit Court. Thus, the continuing tort doctrine is inapplicable and the statute of limitations began to run no later than November 11, 2002 and expired on November 10, 2005. Therefore, the "Amended Complaint" filed on January 9, 2006 by Comp Choice, individually and as assignee of the Grinsteads, is barred by the statute of limitations.

This Court has issued few rulings analyzing the "continuous representation" doctrine. However, the doctrine has been extensively analyzed by state and appellate courts in other jurisdictions. Those courts have recognized that the doctrine exists to protect a client's "innocent reliance" and "dependence" on its attorney. Rosen Construction Ventures, Inc. v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 364 F.3d 399 (1st Cir. 2004)(applying Massachusetts law); Kindle v. Morisset, Schlosser, Ayer & Jozwiak, 217 F.3d 602 (8th Cir. 2000) (applying South Dakota law).

In Kindle, the Eighth Circuit Court of Appeals held that the doctrine applies "only to malpractice actions when there are clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. This relationship is one which is not sporadic but developing and involves a continuity of the professional services from which the alleged malpractice stems." 271 F.3d at 604 (internal citations omitted). The Court rejected the client's argument that occasional

communications made between the attorneys and the client were enough to invoke the rule. The Court held that these acts, including informing the client of the dismissal of their action and preparing a summary of the status of the case, were "in the nature of winding down the relationship that had already been terminated." Id. at 604-05.

Similarly, in Rosen, the First Circuit Court of Appeals held that the "continuous representation" doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." 364 F.3d at 406. However, the Court recognized that the need to protect the client's "innocent reliance" on the attorney terminates when the client has actual knowledge of the harm complained of. "[T]he doctrine has no application where the client actually knows that he suffers appreciable harm as a result of his attorney's conduct." Id. at 407 (emphasis added).

As such, any claim that Comp Choice may have against CSS for the alleged failure to appeal is necessarily barred by the statute of limitations and its claim asserted regarding the failure to appeal was properly dismissed.

ISSUE 3: THE TRIAL COURT PROPERLY CONVERTED CSS'S MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT.

There is nothing in the pending unanswered discovery that impacts the undisputed material facts dictating affirmance of the

Trial Court's Summary Judgment. Therefore, any error, if any, in proceeding on summary judgment is not prejudicial.

"Appellate courts disregard errors that do not result in a miscarriage of justice." Luther T. Mumford, "Mississippi Appellate Practice," p. 15-32 (MLI Press 2006). "The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Adams v. Cinemark USA, Inc., 831 So.2d 1156, 1164 (Miss. 2002). In Adams, the Court ruled that it was harmless error for a trial court to grant summary judgment without a hearing because the trial judge had all the necessary information in his possession to make a ruling. The Court further stated the appellant had ample time for discovery prior to the entry of summary judgment. Id. at 1163-64. See Black v. Tupelo, 853 So.2d 1221, 1224 (Miss. 2003)(failure of trial court to hold a hearing prior to granting motion dismiss was harmless error).

Specifically, Comp Choice's outstanding discovery includes:

A. Interrogatories seeking discoverable information for each and every affirmative defense, identity of individuals with knowledge of factual information relative to the subject matter of the action, documents or other tangible things relative to the subject matter of the action, medical documentation to be relied upon at trial, persons from whom statements had been taken, prior legal action against the firm within the preceding ten (10) years, statement of the

particular standard of care applicable to the firm's treatment of plaintiff during all times relevant, names and addresses of lay witnesses, subject matter of their knowledge, information about expert witnesses and request for verification of answers; and

B. Requests for production of documents including documents "within the possession of defendant relative to any medical treatment of plaintiff," documents identified in answer to Interrogatories, documents to be introduced at trial and insurance policies of coverage for the damages alleged

These discovery request are simply not the subject matter of any information that would affect this Court's evaluation of the propriety of the Trial Court's granting of Summary Judgment. (R. 90-101; Appellee's R.E. Tab 6).

Responses to this discovery cannot change the undisputed material facts relied upon by the Trial Court in entering Summary Judgment on behalf of CSS.

CONCLUSION

The Complaint filed by Safety Risk on September 14, 2005 was not served within 120 days as required by Miss. R. Civ. P. 4(h), and in fact has never been served upon CSS. When the 120 days to effect service expired, Safety Risk's Complaint became null and void.

The "Amended Complaint" filed on January 9, 2006 by Comp Choice, on its own behalf, individually and as assignee of the

Grinsteads, is not an amendment to the original Complaint, because the original Complaint was never served. Miss. R. Civ. P. 15 necessitates that a complaint be filed and served before an amended complaint can be filed. King, 862 So.2d at 563. Furthermore, in any event, the "Amended Complaint" does not relate back to the original Complaint, because it, for the first time, asserts a new cause of action by a separate and distinct party plaintiff, and CSS was never put on notice of this separate cause of action prior to the expiration of the statute of limitations. Bracey, 899 So.2d at 214.

The statute of limitation for an attorney malpractice claim runs for three (3) years from the date that the client knows or should reasonably have known of the alleged malpractice. Smith, 638 So.2d at 1257.

The statute of limitations expired on November 10, 2005. The "Amended Complaint" of Comp Choice was filed on January 9, 2006 and does not qualify as an amendment to the original Complaint which was not served, nor does it relate back to the original Complaint because it brings a new cause of action for a new party plaintiff. Thus, the cause of action pled by Comp Choice, on behalf of itself and as assignee of the Grinsteads, is barred by the statute of limitations.

This Court should affirm the holding of the Circuit Court.

Respectfully submitted,

CLARK SCOTT & STREETMAN, P.A.

By Their Attorneys

MOCKBEE, HALL & DRAKE, P.A.

BY: 

DAVID W. MOCKBEE, MSB#[redacted]

MOCKBEE HALL & DRAKE
Lamar Life Building, Suite 1000
317 East Capitol Street
Jackson, Mississippi 39201
601/353-0035 Telephone
601/353-0045 Facsimile

CERTIFICATE OF SERVICE

I, David W. Mockbee, do hereby certify that I have this day mailed via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee-Clark, Scott & Streetman, P.A. to:

Joel W. Howell, III
5446 Executive Place
P.O. Box 16772
Jackson, Mississippi 39236

Honorable W. Swan Yerger
Hinds County Circuit Court Judge
407 E. Pascagoula Street
P. O. Box 327
Jackson, MS 39205-0327

This the 17th day of August, 2007.

David W. Mockbee

ADDENDUM

LEXSEE 1993 U.S. DIST. LEXIS 8620

JEROME CROWDER, Plaintiff, v. PAGE TRUE, LT. EARL MAYFIELD, LT. J.A. SEIMEN, WILLIAM R. HOGAN, THEODORE POULOUS, AND K. MICHAEL MOORE, Defendants.

No. 91 C 7427

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1993 U.S. Dist. LEXIS 8620

June 24, 1993, Decided
June 24, 1993, Docketed

JUDGES: [*1] PLUNKETT

OPINION BY: PAUL E. PLUNKETT

OPINION

MEMORANDUM OPINION AND ORDER

This matter is before us pursuant to the Defendants' Motion to Dismiss this action pursuant to *Rules 12* and *4(j)*. For the reasons stated below, the motion is denied, in part without prejudice. However, Plaintiff's Complaint is dismissed *sua sponte* with leave to reinstate.

Background

Mr. Crowder, a paraplegic "general" in the El Rukn street gang currently serving a life term in federal prison, alleges that he was denied proper medical care when he was placed in administrative detention at the Metropolitan Correctional Center in Chicago, Illinois while awaiting trial. Crowder alleges that he was not allowed use of his wheel chair to move around in his cell, which resulted in bedsores and muscular discomfort. Mr. Crowder filed his original complaint on November 19, 1991. We ordered service held in abeyance.

An Amended Complaint was filed on May 7, 1992 and we ordered the Marshall's office to issue service of process. Within ninety days of that date, all Defendants were served except for Hogan and Moore, who were never served with process.

The Defendants filed the present motion on December 14, 1992. Mr. Garson Wernick [*2] was appointed to represent Mr. Crowder. However, due to appointed counsel's repeated failure to respond to the Defendant's motion, this matter was not ready for resolution by this court until May 18, 1993, when counsel filed a four page reply to the Defendants' twenty-three page memorandum in support of their motion.

Counsel's Response is inadequate on its face. It glosses over some issues raised by the Defendants while ignoring others altogether. Though Defendants have raised eleven distinct substantive arguments concerning the Complaint, Mr. Wernick deigned to respond to only four, and only one of these was in any way helpful to us in evaluating the motion.

This behavior is inexcusable. When Mr. Wernick was two months late filing a response to the Defendant's motion despite this court's repeated efforts to prompt him to action, he incurred a substantial fine. Mr. Wernick appeared contrite when we ordered him to appear to explain his lapse, and we reserved judgment on the issue of the fine. He did not seek relief from the appointment or suggest that he could not, within the strictures of Rule 11, make a good faith argument on Mr. Crowder's behalf.

Now, in filing a response of such [*3] poor quality and obviously lacking in good faith effort to address the important issues, Mr. Wernick approaches contempt of this court. More importantly, he does a disservice to his client by inadequately representing him and turning the focus of the court's time spent on this case to his conduct rather than to his client's claims. We have grown weary of Mr. Wernick's poor representation of Mr. Crowder. Therefor, we vacate his appointment in this case and will appoint a new attorney to represent the Plaintiff.

In the meantime, we have neither the time nor the inclination to make arguments on behalf of either litigant. The United States Attorney's Office makes arguments that demonstrate to us that Mr. Crowder's Com-

plaint, in its current form, has several severe flaws. Aside from the one issue addressed below, Mr. Wernick's response hardly begins to address these problems.

Therefor, we dismiss the Complaint with leave to reinstate within sixty days of the appointment of new counsel. By proceeding in this fashion, we avoid forcing the Plaintiff to re-serve the Defendants, a procedure that caused substantial trouble the first time around. *See, infra.*

I. *Rule 4(j)*

There [*4] is one issue that we may address even on the current state of the briefs because it is a simple matter of applying the Federal Rules of Civil Procedure to the facts as they appear in the case file: Defendants argue that they were not served within the required time period under the Rules.

Our inquiry into the formalities of personal service reflects a concern far deeper than an unbecoming fascination with the technicalities of the Rules. Rather, our inquiry goes to the very foundation of our authority to hear this case: it has long been recognized that proper personal service is a prerequisite to this Court's exercise of personal jurisdiction. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987)* (federal court may not exercise jurisdiction over defendant unless procedural requirements of service are satisfied); *see also Audio Enter. v. B & W Loudspeakers, 957 F.2d 406, 409 n.5 (7th Cir. 1992)*; *Rabiolo v. Weinstein, 357 F.2d 167 (7th Cir. 1966).*

In federal courts, *Rule 4* governs service of process. *Fed. R. Civ. Pro. 4. Rule 4* sets a specific time limit for effecting service [*5] on named defendants:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action *shall* be dismissed as to that defendant without prejudice . . . .

Fed. R. Civ. P. 4(j) (emphasis added).

It is clear that none of the Defendants in the present case were served within ninety days of the filing of the original complaint. As a general rule, a plaintiff may not simply nullify *Rule 4(j)*'s time limit by filing another complaint: the purpose of an amended complaint is to conform the pleadings to the proof, not to extend the time for effecting service on the defendants. Thus, amendment of the complaint does not usually justify delay in service of the original complaint as to the defendants named therein. [1]

> 1 The proper procedure generally is to effect service upon the original complaint before attempting an amendment. *See Del Raine v. Carlson, 826 F.2d 698, 705 (7th Cir. 1987) (pro se* prisoner's complaint dismissed pursuant to *Rule 4(j)* when defendants not served within time limit of original complaint); *Excalibur Oil, Inc. v. Gable, 105 F.R.D. 543, 544 n.4 (N.D. Ill. 1985)* (Shadur, J.) (proper procedure is to effect service under original complaint, then to amend complaint). *See also Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985)* (desire to amend complaint did not toll limitation for service under 4(j)); *Leonard v. Stuart-James Co., 742 F. Supp. 653, 662 (N.D. Ga. 1990)* (collecting cases); *Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 668 (W.D. Mo. 1990), aff'd, 932 F.2d 697 (8th Cir. 1991)*; *Baden v. Craig-Hallum, 115 F.R.D. 582, 586 n.3 (D. Minn. 1987).*

[*6] In the present case, however, we ordered issuance of summons pursuant to the original complaint suspended, and ordered that it issue on several subsequent occasions. Each time, service was returned to the clerk unexecuted by the Marshall's service for failure to provide USM-285 forms. The last time we ordered summons to issue, all defendants but Moore and Hogan were served within ninety days.

Of course, an incarcerated *pro se* plaintiff, as the Plaintiff in the present case was, is at the mercy of the Marshal's office to effect service of process. It is clear that he need only provide the Marshal the information necessary to identify the defendants and no more. "Once that information is provided, the Marshal should be able to obtain a current business address and complete service." *Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990)* (adopting the holding of *Puett v. Blandford, 895 F.2d 630, 635 (9th Cir. 1990)).*

The Defendants' argument that Crowder had the burden of providing the address of Defendant Moore, now a federal judge, is disingenuous and misstates the law. In the present case, Mr. Crowder provided [*7] the names of all the Defendants to the Marshal well within ninety days after we ordered service to issue. Once he provided that information, he met his burden under *Rule 4(j)*, and cannot be held responsible for the Marshal's failure to ever effect service on Moore and Hogan or to effect service on the other Defendants in a more timely fashion. Thus, the motions of True, Mayfield, Seiman, and Poulous, to the extent it relies on *Rule 4*, are denied with prejudice. [2]

2 If Hogan and Judge Moore remain Defendants in this action, it will be within counsel's ability to obtain their current business addresses and see that they are served with process within ninety days of the receipt of this order. Should these Defendants, who were never served by the Marshal, not be served within this period, they are given leave to again raise *Rule 4(j)*.

Conclusion

Mr. Wernick's appointment as counsel for the Plaintiff is vacated. New counsel is to be appointed. Because of Mr. Wernick's failure to adequately respond to the Defendant's [*8] motion, we deny it without prejudice to the Defendant's ability to raise those issues at a later date. We deny the motion with prejudice to the extent it relies on a failure to timely serve Defendants True, Mayfield, Seimen, and Poulous. However, due to the severe defects that are clear upon the face of the Complaint, we dismiss it *sua sponte* and hereby grant the Plaintiff leave to reinstate within sixty days of the appointment of new counsel.

Serious consideration should be given by Mr. Crowder's new counsel to drafting an entirely new complaint that addresses the concerns we have, including but not limited to: [3] (1) what causes of action are being alleged; (2) who the proper defendants are for each of those causes of action; (3) in what capacity the defendants are sued (to the extent any non-*Bivens* claims are plead); (3) on what basis their liability rests; and (4) the extent the Plaintiff has exhausted his administrative remedies on his claims of discrimination on the basis of handicap. [4]

3 We recognize the liberal notice pleading standard created by the federal rules and do not expect the amended complaint to plead evidence or undo factual detail.

[*9]

4 *See 28 C.F.R. § 39.170(d)*; 28 C.F.R. part 542; *36 C.F.R. § 1150.104*.

ENTER:

PAUL E. PLUNKETT

UNITED STATES DISTRICT JUDGE

DATED: June 24, 1993