IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MS COMP CHOICE, SIF	APPELLANT
VS.	No 2007-TS-00117
CLARK, SCOTT, & STREETMAN	APPELLEE

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MS COMP CHOICE, SIF — PLAINTIFF-APPELLANT

VS. — No 2007-TS-00117

CLARK, SCOTT & STREETMAN — DEFENDANT-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1.	MS Comp Choice, SIF	Plaintiff-Appellant
2.	Joel W. Howell, III	Attorney for Plaintiff-Appellant
3.	Clark, Scott & Streetman	Defendant-Appellee
4.	David Mockbee	Attorney for Defendant-Appellee
5.	David Denison	Attorney for Defendant-Appellee

SO CERTIFIED, this the 28th day of August, 2007.

Joel W. Howell, III
Attorney of Record for
Plaintiff-Appellant

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REPLY TO APPELLEE'S ARGUMENT

I. Factual Corrections

Appellee continues to assert propositions that simply are not true. The Amended Complaint (R. 9) clearly states Mississippi Comp Choice, SIF (hereinafter "Comp Choice") is the assignee of Safety Risk Services, Inc. as well as of Elie Grinstead and Francine Grinstead as detailed hereafter.

The Clark firm's main argument turns on two incorrect factual assertions: (1) that Comp Choice is not an assignee of Safety Risk Services, Inc. (Brief at 17); and (2) that its representation of Comp Choice concluded with its negligence per se failure to timely appeal from the underlying case's final judgment on October 18, 2002 (Brief at 24). The Clark firm argues that because Comp Choice was not an assignee of any claim, its "new" malpractice complaint was untimely. Inasmuch as the only evidence so far presented is Comp Choice's principal's statement in an affidavit that it holds an assignment from Safety Risk Services, Inc., the third party administrator and original plaintiff, the Clark firm's persistence in asserting the contrary is inexplicable.

The Amended Complaint states in the first paragraph that Comp Choice is an assignee of: "any and all interest of [the Grinsteads] against MS Comp Choice, SIF, Safety Risk Services, Inc., Monticello Forest Products, Inc.,

Evans/Giordano, Inc., and those in privity with them and Safety Risk Services, Inc." (R. 9) The second mention of Safety Risk Services at the end of the sentence only makes sense in the context of an implied "of" connecting "assignee" with "Safety Risk Services." Otherwise the second appearance of "Safety Risk Services, Inc." is redundant surplusage. Courts do not interpret contracts or statutes in such a manner and neither should Comp Choice's complaint be treated cavalierly.

If there were any doubt, then the Clark firm could have requested a Rule 12(e) statement of the claim. However, any doubt would seem to have been resolved by the affidavit of Comp Choice's Guy Evans: "After the [bad faith] litigation was concluded, all claims of Safety Risk Services, Inc. and Elie Grinstead and his wife were assigned to MS Comp Choice SIF." (R. 71)

Second, the Clark firm posits that its representation ended with its failure to timely appeal to the Supreme Court from the underlying Workers Compensation case. The additional contacts between Comp Choice and the Clark firm, it claims, were "in the nature of winding down the relationship." (Brief at 28) In support of this characterization, the Clark firm cites the Complaint's references to its negligence, breach of contract, and breach of fiduciary duty in connection with having failed to appeal the Grinstead work-

ers compensation matter. (Brief at 21)

The quotations are accurate, but they are not complete. The first count of the complaint refers to the Clark firm's "actions and inactions" as constituting breach of contract. The second substantive paragraph of Court I refers to the entire course of dealings between the Grinsteads and Comp Choice and accuses the Clark firm of having caused these untoward events through breach of contract.

It would be an unusual case where later affidavits, depositions, and hearings did not lend substance to a complaint's or answer's allegations. The Complaint placed the Clark firm on notice that its course of dealing with the Grinstead matter was the subject of the claims against it. The Clark firm invites the Court to find an ultimate fact - when its representation ended - on the back of a summary judgment motion granted at an early point in the litigation. That issue most certainly involves a material issue of fact and is yet another error committed by the trial court, mandating reversing its decision and remanding this action.

II. Standard of Review.

Appellee attempts to distinguish the case law regarding preparation of the Memorandum Opinion almost <u>in toto</u> by counsel for Appellee. Appellant's original discussion of the heightened standard (original brief at pages 8-9) still

applies. The standard of review remains de novo.

III. Grounds of Error.

A. The trial court erred by first concluding that a duly filed complaint must be served before it can be amended and then ruling that an amended complaint, which only substituted the stated claims' real owner for the prior owner who had assigned the claims, was "void" and a "new cause of action."

Counsel continues to assert that this was a new cause of action (Appellee's Brief at 10-12), when it is not. A comparison of the original Complaint (R. 3-8), with the amended Complaint (R. 9-14) shows that the ONLY difference is in paragraph one naming the parties. That paragraph plainly states that Comp Choice is an assignee of the interest of both Elie Grinstead and Safety Risk Services, Inc.

Counsel asserts that an original complaint must be served before it is amended (Appellee's Brief at 11-13) Nothing could be further from a correct interpretation of the applicable case law. First, there is no such language in Rule 15; second, under Mississippi case law, an amendment naming the real party in interest relates back to the original filing date under the terms of Rule 15 and Rule 17. See Tolbert v. Southgate Timber Co., 943 So.2d 90, 101-02 (Miss. App. 2006) (Appellant's Brief at 10).

Moreover, as the Tenth Circuit pointed out in Scheufler v. General Host Corp., where defendant is aware of the participants, the operative facts and critical issues arising

from those facts, defendant cannot claim surprise by appearance of a new owner of the claims. 126 F.3d 1261, 1269-70 (10th Cir. 1997) (Appellant's Brief at 10) Here, the cause of action arises out of the Clark firm's defense of a worker's compensation case asserted against the employer, the third party administrator, Safety Risk Services, Inc., and the self insured fund, Comp Choice (all named parties).

Appellee again asserts that a complaint must be served first in order to trigger a responsive pleading before a complaint can be amended. (Appellee's Brief at 13) Appellees have no case law in support of that proposition. Moreover, the quote from the King case, which has been overruled, is in any event inapplicable to these circumstances. (862 So.2d at 563). There is no case law which supports the proposition that Rule 15 does not apply because the complaint was never served.

The Clark firm cites a number of cases for the proposition that "an amended complaint does not revive a complaint that was never served." (Appellee's Brief at 11, fn. 6) A careful reading of these cases reveal that they do not stand for that proposition or have anything to do with such a notion. Each of the cited cases concerns Rule 4's 120 day time limit, not whether an amended complaint "revives" one never served. Those courts were pointing out that it is far more prudent to serve the original complaint within the 120

day time period rather than bungle the deadline with an attempted amendment. In other words, those cases are about the simple proposition that, except in unusual circumstances, amending a complaint will not constitute "good cause" under Rule 4(h) for tolling the 120 day period.

Comp Choice does not, and has never, contended that filing an amended complaint extends or tolls the 120 day period. It does not need to: the Amended Complaint was served within 118 days of the filing of the original. As the Clark firm suggests through its inaccurate citations, and as was accurately stated in Comp Choice's principal brief at 16, the law is clear that an amended complaint does not extend or restart the 120 day service period.

What the Clark firm appears not to appreciate from the cases it inaccurately cites is that if a complaint had to be served before it could be amended, there would be no issue about the effect of an amended complaint on the original complaint's 120 day period because the original would already have been served. Here, uncontestably, service was timely effected.

Given that Rule 15(a) contains no requirement that a complaint first be served prior to its amendment, it hardly seemed necessary to string-cite decisions from the federal courts. Nevertheless, contrary to the Clark firm's assertion that an "amended complaint" cannot be an amended com-

plaint for the lack of a previously served complaint, the federal decisions are unanimous as far as research has revealed that a complaint can be amended (once in the federal system) without leave of court at any time before a responsive pleading is served. Because the rule states no other requirements, there perforce are none. See Marshall v. Knight, 445 F.3d 965, 970 (7th Cir. 2006) (denial of amendment prior to service of answer contrary to Rule 15(a)); Brown v. Johnson, 387 F.3d 1344, 1348 (11th Cir. 2004) (abuse of discretion to refuse Rule 15(a) right to amend prior to responsive pleading); Shane v. Fauver, 213 F.3d 113, 115 (3rd Cir. 2000) (per Alito, J, in the typical case where defendant asserts the defense of failure to state a claim by motion, the plaintiff may amend the complaint once without leave of court); Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1131 (10th Cir. 1994) (Rule 15(a) right to amend without leave of court prior to service of "responsive pleading" not terminated by motion to dismiss); Washington v. New York City Bd. of Estimate, 709 F.2d 792 (2nd Cir.) (abuse of discretion to refuse amendment prior to service of complaint and responsive pleading), cert. den., 464 U.S. 1013 (1983).

Also, amendment as of right can be forestalled only by the service of a "responsive pleading." Cases uniformly hold that a "responsive pleading" is solely one of the plea-

dings mentioned in Rule 7(a). Other responses, such as motions to dismiss or for summary judgment, do not suffice. See, e.g., Euda v. Board of Educ. of Franklin Park Public School Dist. No. 84, 133 F.3d 1054, 1056-57 (7th Cir. 1998) (motion to dismiss not "responsive pleading"; error to refuse amendment); United States ex rel. Saaf v. Lehman Brothers, 123 F.3d 1307, 1308 (9th Cir. 1997); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 872 n. 2 (5th Cir. 1976) (neither motion to dismiss nor for summary judgment is "responsive pleading" for purposes of Rule 15(a)), vacated in part on other grounds, 545 F.2d 919 (5th Cir. 1977) (en banc); Kroger Co. v. Adkins Transfer Co., 408 F.2d 813 (6th Cir. 1969); Rogers v. Girard Trust Co., 159 F.2d 239 (6th Cir. 1947); Roberts v. Husky Ind., Inc., 71 F.R.D. 479 (E.D.Tenn. 1973).

The Clark firm appears to miss the point that it is the filing of a claim with the clerk of a court that tolls the limitations period for Rule 4's service period. Heard v. Remy, 937 So.2d 939, 942-43 (Miss. 2006). At what point within the 120 days allowed under Rule 4(h) a defendant is served is irrelevant; the claim is still timely. Only the Clark firm's blind insistence that Comp Choice somehow cannot be an assignee of a timely filed claim, and therefore claim through that timely filed claim under Rules 15 and 17,

supports its argument. The Clark firm's suggestion that it was not "put on notice" prior to the running of the statute of limitations (Brief at 15, 19, 20) is incorrect since their alleged limitations period was tolled under Rule 4 and did not expire until two days after the Clark firm was served and "put on notice."

B. The trial court incorrectly ruled that the substitution of the real party in interest by way of the amended complaint was a "new cause of action" that did not relate back to the original filing and so was barred by the statute of limitations.

Appellee erroneously asserts that the amended complaint cannot relate back because it was instead a new party to a new action. (Appellee's Brief at 14). Rule 15(a) informs that a plaintiff substitution is proper as long as the new plaintiff's claim arose out of the same conduct, transaction, or occurrence. Service of a pleading prior to its amendment is not necessary under Rule 15(a), and federal courts routinely hold a complaint may be amended as a matter of course prior to service. Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986). In Wright, the Eleventh Circuit concluded that the trial court abused its discretion when it refused an amended complaint because the original had not been served. 795 F.2d 964, 967 (11th Cir. 1986).

Appellee cites Bracey v. Sullivan, 899 So.2d 210, 214 (Miss. Ct. App. 2005) as further support for its contention of a "new" cause of action. (Appellee's Brief at pages

14-16) That case is inapposite; in it, an amendment after the statute of limitations had run was sought to add a cause of action for an ailment and a prescription unrelated to those of the initial complaint. (899 So.2d at 213-214). Here, the parties and underlying facts are identical. See Appellant's Brief at page 12.

Here again, Appellee continues to assert that Comp Choice did not define itself as an assignee of Safety Risk Services, Inc. at the time it filed its Amended Complaint (Appellee's Brief at 17), ignoring the plain language of paragraph one of the Amended Complaint (R. 9), much less the affidavit detailing the assignment adduced in response to the motion. (R. 71)

C. The trial court erred in granting summary judgment based only on the prescriptive period applying to the Clark firm's negligence per se failure to timely file an appeal and ignoring the limitations period applying to the claims based on the Clark firm's having failed to timely advise the plaintiff - a defendant in the underlying workers' compensation matter - about the injured employee's medical status and needs.

Appellee then asserts that the statute of limitations had run and was limited exclusively to November 11, 2002. (Appellee's Brief at 22).

Both the Original Complaint (R. 5-7) and the Amended Complaint (R. 12-13) assert claims of negligence, breach of contract, and breach of fiduciary duty. These events took place on several different dates and occasions throughout

the duration of representation by the Clark Firm which ended in September 2003. To pinpoint one solid, arbitrary date of expiration is incorrect factually as well as legally.

The Clark firm argues that its representation was coterminous with the underlying workers compensation litigation. In support of the argument, the firm refers to the form release it transmitted on November 11, 2002, as evidence that Comp Choice knew "that there had been a final disposition of [the workers' compensation litigation] as the terms of payment of the workers' compensation benefits were being negotiated." (Appellee's Brief at pages 21-22) That the form was unexecuted and, in any event, since Comp Choice had a few days earlier been sued for bad faith, this is evidence that the Clark firm's representation in negotiating payment of benefits was on-going as of November 11, 2002.

The Rules of Professional Conduct would not have allowed the Grinsteads' lawyer direct contact with Comp Choice. Rule 4.2, Miss.R.Prof.Cond. The "negotiations" and continuing responsibility of Comp Choice to provide benefits under Mississippi law following the final judgment would necessarily have been routed through the Grinsteads' lawyer to Comp Choice's lawyer. According to Joe Bridewell, the third party administrator, the Clark firm failed to keep him informed of Mr. Grinstead's medical needs and bills and this ultimately led to the firm's discharge in September of 2003.

(R. 68)

Comp Choice's claims against the Clark firm spring from its course of representation during the Grinstead matter. The Amended Complaint contains no express limitations on the acts and omissions on which it bases its claim of malpractice. Bridewell's affidavit makes clear that Comp Choice claims multiple events of malpractice, not harm reverberating from one act or omission to act. The cases cited by the Clark firm belie its assertion that the representation ended in October or November of 2002.

A Georgia case, Hill v. State, 269 Ga. 23, 494 S.E.2d 661 (Ga. 1998), cited by the Clark firm, assessed whether defense counsel's representation of a prosecution witness over three years before his representation of the defendant rendered his assistance ineffective. The two criminal cases were unrelated and the witness - serving a twenty year sentence - had provided no confidential information to the lawyer that would have prevented a thorough cross-examination (and therefore effective assistance of counsel) or otherwise have affected the lawyer's defense of Hill. The Georgia Supreme Court had little trouble concluding that the representation of a criminal defendant ended with sentencing absent an obligation to appeal.

However, those facts are far from a workers' compensation representation. The Court may notice that typically

law firms have long-term relationships with workers compensation insurers, as was the case here. (R. 70) A given representation may not conclude with the final judgment because of the final settlement options allowed under Miss. Code Ann. §§71-3-29, and 71-3-37(10), and because, as was true in the underlying Grinstead case, the award was for temporary total disability benefits. (R. 25) In a sense, the Grinstead case was in its infancy: maximum medical recovery was yet to be determined as well as whether and to what degree Grinstead's disability was permanent. Moreover, once the Commission's judgment became final in the underlying case, Comp Choice had an ongoing duty to meet the terms of the award, regardless of the bad faith lawsuit. Miss. Code Ann. §71-3-37. In this case, the "final judgment" of temporary total disability did not, by its nature, conclude the case but only allowed temporary benefits.

In Stevens v. Lake, 615 So.2d 1177, 1182 (Miss. 1993), the Supreme Court of Mississippi considered whether a long-term relationship between a lawyer and client would toll the prescriptive period for a malpractice claim. As the Clark firm correctly points out, the Court there rejected the idea that mere continuity of the relationship was the touchstone for applying a statute of limitations. Instead the Court looked to the content of the representation as it related to the malpractice claim.

An on-going relationship where a lawyer renders services unrelated to those claimed to give rise to the malpractice claim does not toll a limitations period. Under this standard, the Court should look to the time that the Clark firm last represented Comp Choice with respect to the Elie Grinstead workers compensation matter. According to the only evidence in the record on this subject, that date was in September of 2003.

D. The trial court erred in converting the defendant-appellee's motion to dismiss to a motion for summary judgment, ignoring discovery propounded with the amended complaint and a motion by plaintiff-appellant to compel responses to that discovery.

The Mississippi Supreme Court has repeatedly confirmed the entitlement of discovery responses by a plaintiff-appellant. Jones v. Jackson Public Schools, 767 So. 2d 730, ¶3, (Miss. 2000); Aladdin Constr. Co. v. John Hancock Life Ins. Co., 914 So. 2d 169, 175 (Miss. 2005). Mississippi Rules of Civil Procedure 12(b) and 12(c) both provide "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" where the original Rule 12(b) motion is converted to one for summary judgment under Rule 56.

Appellee argues that the requested discovery was irrelevant and would not lead to any material information. (Appellee's Brief at 30). This is simply untrue, and at best is unknown until discovery responses were received and

depositions taken.

CONCLUSION

This appeal involves a Rule 12 motion to dismiss erroneously converted to a Rule 56 motion for summary judgment, despite the presence of two material facts: Comp Choice, plaintiff in the amended complaint, was an assignee of Safety Risk Services, and the allegations of negligence as to appellee the Clark Firm continued until its dismissal in September of 2003.

The decision below was further compounded by the trial court erring as a matter of law in holding that an initial complaint must be filed before being amended. Here, the complaint was properly amended and timely served.

The trial court again erred in ruling that an assignee asserting an identical cause of action under identical facts became a new cause of action.

Error continued in arbitrarily applying a single date for the prescriptive period in the face of the aforementioned material facts, and concluded by ignoring Comp Choice's filed discovery and motion to compel responses, instead precipitously granting the motion for summary judgment.

Even one of the foregoing errors would be cause for remand. The combination of four errors mandates that the judgment of the lower court be reversed and that this action

be remanded.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Joel W. Howell, III, do hereby certify that I have caused to be delivered a copy of the foregoing Reply Brief of Appellant to:

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SO CERTIFIED, this the 28th day of August, 2007.

_____
Joel W. Howell, III