

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MS COMP CHOICE, SIF

APPELLANT


VS.

No 2007--00117

CLARK, SCOTT, & STREETMAN

APPELLEE

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 20th day of July, 2007.

  
Attorney of Record for  
Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

The ruling of the trial court is erroneous for a number of reasons detailed herein, but particularly regarding the interpretation and application of Mississippi Rules of civil Procedure 15 and 17. Oral argument would be of material assistance in clarifying these errors.

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2. 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

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3. 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. 18

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## I. STATEMENT OF ISSUES

This is a legal negligence case based on an underlying workers' compensation matter. When the workers' compensation matter entered litigation, Appellant MS Comp Choice, SIF ("Comp Choice"), a self-insured pool, Safety Risk Services, Inc. ("Safety Risk"), its third-party administrator, and the employer were defended by defendant-appellee Clark, Scott & Streetman ("Clark firm").

Safety Risk Services filed the original complaint; its interest in the malpractice claim against the Clark firm was assigned to Comp Choice, as noted in the amended complaint. The amended complaint was served within the original complaint's 120 day service period. The Clark firm chose to defend solely on Rule 12 grounds asserted by motion; no responsive pleading was filed.

The issues are:

1. 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."

2. 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.

3. The trial court erred by 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.

4. 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.

## II. STATEMENT OF THE CASE

This is a legal malpractice action against defendant-appellee the Clark firm. The following statement of the case is divided into the matters which underlay the cause of action against it, and into the procedural history of the case itself.

### A. The Underlying Action.

The underlying workers' compensation case involved a claim by one Eli Grinstead against Monticello Forest Products, Inc. ("Monticello"), his employer and a member of the

Comp Choice self-insured pool. Grinstead was injured on February 17, 2000. (R. 4) Following the filing of a petition to controvert, the Clark firm was hired to defend Monticello, Comp Choice, and Safety Risk. (R. 4-5)

Monticello had treated Grinstead as a self-employed independent contractor. The compensation claim was defended under a forestry industry provision contained in Miss. Code Ann. §71-3-5 which does not require benefits to be paid to one for whom no unemployment tax has been paid. As was true at the time, this provision has not been interpreted or applied by either Mississippi appellate court. (R. 5)

Both the Commission and the Circuit Court of Lawrence County returned decisions adverse to defendants. An appeal from the Circuit Court's decision would have been due on or before October 18, 2002. (R. 5) The Clark firm had been directed to prosecute an appeal, but failed to do so. (R. 5-6) The firm also failed to timely advise the workers' compensation defendants concerning the proper payment of benefits to Grinstead. (R. 67-72) For these deficiencies the Clark firm was discharged in September of 2003. The Clark firm's failures led to a bad faith suit. Grinstead's compensation claim and the bad faith case were concluded at different times by Safety Risk and Comp Choice.

#### B. History of This Action.

This action was originally filed by Safety Risk on

September 14, 2005. (R. 3-8) The original complaint was amended and was brought by MS Comp Choice, SIF, the assignee of Safety Risk (R. 70-72); the underlying facts, causes of action and defendant are identical. (R. 3-8,9-12) The amended complaint was served on January 10, 2006, an elapse of 118 days. (R. 17-18)

Both complaints listed the same claims for legal malpractice, breach of fiduciary duty, and punitive damages. (R. 3-12) The Clark firm filed a motion to dismiss under Rule 12 on February 9, 2006. At the time of service of the amended complaint, Comp Choice had promulgated discovery requests (R. 15-16); it later filed a motion to compel responses. (R. 90-101)

The trial court issued very sketchy rulings. (R. 108-110) On December 28, 2006, a "Memorandum Opinion and Order" prepared by the Clark firm's counsel was signed by the trial judge. (R. 111-115) The first ruling was that the Clark firm's motion to dismiss would be converted to one for summary judgment. After summarizing the case's procedural history, the opinion states that since the "original complaint . . . was not served on the defendant, the 'Amended' Complaint . . . was in effect a new complaint filed after the statute of limitations had expired and, therefore, was untimely." (R. 111-115)

Citing and quoting King v. American RV Centers, Inc.,

862 So.2d 558, 563 (Miss. App. 2003), the opinion stated that the amended complaint was not effective as an amendment of the original complaint because the "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." (R. 113)

The opinion states that the amended complaint's substituted plaintiff was advancing a new cause of action and "therefore [the amended complaint] does not relate back to the original complaint of Safety Risk Services, Inc." (R. 113) The opinion concludes by observing that because the first complaint was never served and the amended complaint did not relate back to the original filing date, the amended complaint was barred by the statute of limitations which had expired in November of 2005, or about two months before the amended complaint was filed and served. (R. 114-115)

The opinion does not quote nor mention Rule 15, governing pleading amendments, nor Rule 17, which defines the real party in interest and requires that actions be prosecuted by the real party. Nor did the opinion mention the claim that the Clark firm's legal negligence and fiduciary breach involved not only missing an appeal deadline but also consisted of failing to inform Monticello, Comp Choice, and Safety Risk about Grinstead's medical needs and status which led to

the firm's dismissal in September of 2003 (and also to Grinstead's bad faith suit). The original complaint was filed in September of 2005 and the amendment served in January of 2006. 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.

### III. SUMMARY OF THE ARGUMENT

The trial court below erred in finding that the amended complaint was void, as Rule 17 mandates that an action be prosecuted by the real party in interest. Rule 15 allows amendment at any time before a "responsive pleading" is served. Here, the amendment was before process was served and was against the same defendant for the same "conduct, transaction, or occurrence."

The trial court further erred in arbitrarily determining a single date was related to the prescriptive period, when the complaint included allegations for a continuing period of negligence.

The trial court then erred in converting a motion to dismiss to a motion for summary judgment, ignoring not only discovery filed with the amended complaint, but a motion to compel responses.

It was proper to amend the complaint to name the real party in interest under Rule 17, the amended complaint re-

lates back to the date the original complaint was filed under Rule 15, the prescriptive period was arbitrarily determined where there were issues of material fact as to defendant's conduct, and discovery should have been allowed. The judgment below should be reversed and remanded for trial.

#### IV. ARGUMENT

##### A. Introduction

The plaintiff in this case served the interest of judicial economy by amending the original complaint in the name of the real party in interest, only to have the circuit court dismiss it. It did so on the ground that the amended complaint was a new cause of action and was filed after the statute of limitations had run.

This Court should reverse that ruling. The causes of action did not change, nor did the underlying facts or the defendant. It is clear 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. 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.

##### B. The Standard of Review

Defendant-appellee never filed an answer, relying instead upon a Rule 12 Motion to Dismiss. The Official Comment to Mississippi Rule for Civil Procedure 12(b)(6), supported by precedent, states that "to grant [12(b)(6)] motions there must appear TO A CERTAINTY that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." Martin v. Phillips, 514 So. 2d 338 (Miss. 1987) (emphasis added) As such, the existence of any claim under which relief is grantable will preclude the granting of a motion submitted under MRCP 12(b)(6). Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida, 434 F.2d 871, 874 (5th Cir. 1970).

Here, the trial court converted the motion to dismiss to a motion for summary judgment, notwithstanding (and even failing to mention) that plaintiff-appellant had filed not only discovery, but a motion to compel that discovery.

Given the foregoing, the heightened standard of a motion to dismiss should apply to this appeal. Even should the standard be that of a motion for summary judgment, this action should still be reversed and remanded for discovery and trial on the merits.

Summary judgment is granted in cases where there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Miss. R. Civ.



P. 56(c). The Mississippi Supreme Court then conducts a de novo review to determine if the trial court properly granted a motion for summary judgment. Daniels v. GNB, Inc., 629 So.2d 595, 599 (Miss. 1993).

In conducting a de novo review, the evidence is viewed in a light most favorable to the nonmoving party. Daniels at 599. See also Conrod v. Holder, 825 So.2d 16,18 (Miss. 2002).

Here, moreover, the trial court made the barest findings. (R. 108-110) Its verbatim adoption of the opinion submitted by defense counsel further supports the strictest standard of review. See Miss. Dep't of Transp. v. Johnson, 873 So.2d 108, 111 (Miss. 2004), Holden v. Frasher-Holden, 680 So.2d at 795, 798 (Miss. 1996).

#### C. Grounds of Error

1. One who is assigned another's chose in action is a real party in interest under Rule 17 whose substitution in litigation relates back to the original complaint under Rule 15 where the claims and defendant remain as in the original filing. The trial court erred by ruling that this was a new cause of action and the amended complaint was void.

The foundational principles of this case are straightforward: the owner or assignee of a chose in action is a "real party in interest" within the meaning of Rule 17. Citizens Nat'l Bank v. Dixieland Forest Products, LLC, 935 So.2d 1004, 1013 (Miss. 2006) (owner of chose in action is real party in interest); Sneed v. Ford Motor Co., 735 So.2d

306, 313 (Miss. 1999) (insurers having received assignment are real parties in interest). When an assignment of a chose in action leaves only one person as a plaintiff with an interest in the litigation, Rule 17 requires the owner to proceed. Citizens National, 935 So.2d at 1013-14.

Where a complaint is amended to name the real party in interest after the statute of limitations would have run on a new complaint, the amendment relates back to the original filing date under the terms of Rules 15 and 17. Tolbert v. Southgate Timber Co., 943 So.2d 90, 101-02 (Miss. App. 2006). Tolbert involved a landowner who died intestate in 1917, whose estate was not opened until 1965 and closed in 1974. 943 So.2d at 92. After timber from the subject property was cut after execution of a timber deed from only two of a number of heirs, an action for waste was brought by the administratrix of the reopened estate. Id. The Mississippi Court of Appeals found that even an amendment under these circumstances related back under the terms of Rule 15 and properly named real parties in interest under Rule 17. 943 So.2d at 101-102.

Rule 17(a) requires that all actions be prosecuted by the real party in interest. Generally, the rule compels substitution of parties where some event such as an assignment or levy has altered the person with an interest in the claim. See Scheufler v. General Host Corp., 126 F.3d 1261,

1269-70 (10th Cir. 1997); Advanced Magnetics Inc. v. Bayfront Partners, Inc., 106 F.3d 11 (2nd Cir. 1997). To avoid forfeitures, Rule 17(a) states that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for . . . substitution of the real party in interest . . . ." The final clause of Rule 17(a) states the policy clearly: "substitution [of the real party in interest] shall have the same effect as if the action had been commenced in the name of the real party in interest." Where the same claims are stated by the claims' new owner, the amendment relates back because such "substitution shall have the same effect as if the action had been commenced in the name" of the assignee, Comp Choice. Scheufler, 126 F.3d at 1270-71.

As the Scheufler court pointed out, where a defendant is well aware of the participants in the operative facts and the "critical issues" arising from those facts, then the defendant cannot claim surprise by the appearance of the new owner of the same old claims. Id. In terms of the underlying facts and claims, changing the face of the plaintiff does not affect the defendant or the defense.

Rule 15 and Rule 17 state parallel requirements for relation-back of amendments substituting the real party in interest. The trial court's ruling that a substituted plai-

ntiff's claim does not relate back is based on cases involving adding a new claim or a new defendant; e.g., Bracey v. Sullivan, 899 So.2d 210, 214 (Miss. App. 2005). Rule 15 contains different requirements for adding or replacing plaintiffs and adding or replacing defendants.

The core requirement for relation back common to all amendatory situations is that the change must arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." Where the party against whom a claim is asserted is sought to be changed, the rule places two additional due process requirements on the amending plaintiff: (1) the new defendant must have received such notice that the new party's defense is not prejudiced; and (2) the new party knew or should have known that but for a mistake in identity the action would have been originally brought against that person.

Only an amendment changing the party against whom a claim is made must satisfy the additional due process conditions. Staggers v. Otto Gerdau Co., Inc., 359 F.2d 292, 296 (2nd Cir. 1966) (Rule 15(a) may be used to substitute a new plaintiff whose claim arose out of the same conduct, transaction, or occurrence).

In this case, the complaint was amended to substitute the real party in interest and that is all. Rule 15(c)'s

core requirement that the amendment arise from the same "conduct, transaction, or occurrence" is met when the same claims are asserted by the new owner. Again, Rules 15 and 17 state parallel procedures where an amended pleading replaces the real party in interest.

Rule 15(a) provides that a "party may amend a pleading as a matter of course at any time before a responsive pleading is served . . . ." It is common even for lawyers to refer to most case filings as "pleadings," but the Rules of Civil Procedure use "pleading" as a term of art. Under Rule 7(a), "pleadings" are limited to: "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who is not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed."

This exclusive list does not refer to Rule 12 motions or motions converted to ones under Rule 56. Rule 7 treats motions separately from pleadings and denominates "motions" as an "application to the court for an order." In this case, no "responsive pleading" within the terms of Rules 7 and 15 has ever been filed or served. McKinney v. Irving Indep. School Dist., 309 F.3d 308, 315 (5th Cir. 2002), citing McClellan v. Mississippi Power & Light Co., 526 F.2d

870, 872 (5th Cir. 1976), mod. on other grounds 545 F.2d 919 (5th Cir. 1977) (Rule 12 motion not "responsive pleading" under Rule 15).

Rule 15(a) contains no requirement that a pleading must be served before it may be amended. Rather, it allows amendment at will until a responsive pleading has been served. Federal courts routinely hold that a complaint may be amended as a matter of course prior to service of the original complaint. E.g., Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986) (trial court abused its discretion in refusing amended complaint where original had not been served). Rule 15 uses a filed and served answer as a timing device: before service of the responsive pleading, a complaint may be amended without leave of court; after an answer is served, the complaint may be amended only with permission. This is the only relevance of "responsive pleading" in the process stated in Rule 15.

Rule 15's policy of allowing plaintiffs to amend prior to having served the original complaint allows plaintiffs the best possible opportunity to state cognizable claims prior to fully invoking the power of the state in legal proceedings against a defendant. Obviously there is no prejudice to either the justice system or a defendant where a complaint has only been filed, not served, and then replaced. Only after service must a defendant answer or de-

fault and the justice system incur costs in ushering the case to a close.

It is true that a Court of Appeals decision, since overruled, commented that the "... 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." King v. American RV Centers, Inc., 862 So.2d 558, 563 (Miss. App. 2003), overruled by Wilner v. White, 929 So.2d 315 (Miss. 2006).

The King court's remark that a complaint can only be amended when it has been served but not yet answered was dicta. The issue in that case was whether an amended complaint served outside the original complaint's 120 day period was effective. It is also a casual remark that likely corresponds with experience; perhaps many complaints are amended after service but before the answer is received. But the Court of Appeals' statement is not a strictly accurate reading of Rule 15(a).

The amended complaint was served 118 days after the original complaint was filed. Comp Choice does not claim that filing an amended complaint restarts Rule 4's timing provision. Because the amended complaint relates back to the original filing, so long as it was served within 120 days of the first complaint, then the relation-back avoids

any difficulty with the statute of limitations based on the Clark firm's omission to appeal. White v. Steak & Ale of Little Rock, Inc., 839 F.Supp. 23, 25 (E.D. Ark. 1993) (plaintiff filed and served amended complaint within 120 days of original complaint giving defendant notice within Rule 4 period); see also Tolbert, 943 So.2d at 101-02 (amendment substituting real party in interest relates back where statute of limitations would have run on new claim).

2. The trial court erred in ruling that the substitution of the real party in interest by way of the amended complaint created a "new cause of action" that did not relate back under Rule 15(a) and so was barred by the statute of limitations.

Here, again, the opinion prepared by counsel and signed by the trial court without change misstates the applicable case law.

Even where a complaint is amended after the statute of limitations has arguably run, amendments naming the real party in interest relate back to the original complaint under Rules 15 and 17. Tolbert v. Southgate Timber Co., 943 So.2d 90, 101-02 (Miss. App. 2006). Because the ONLY amendment was in correctly naming the real party in interest, the claim must relate back to the original complaint provided Rule 15's transactional nexus requirement is satisfied.

Because the original complaint outlined an identical transactional nexus (identical facts and claims, but also concerning the same entities in the same representative ca-



pacities as the original complaint), defendant was placed on notice of the subject dispute and the amendment relates back to the original pleading. Bedford Health Properties, LLC v. Estate of Williams ex. rel. Hawthorne, 946 So.2d 335 (Miss. 2006).

Rule 15(a) considers plaintiff substitution proper where the new plaintiff's claim arose out of the same conduct, transaction, or occurrence. Rule 15(a) does not require service of a pleading prior to its amendment, and, absent extraordinary circumstances, 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)(trial court abused its discretion in refusing amended complaint where original had not been served). Therefore, even if the amended pleading had not been correctly served, the reflection of the real party in interest must still relate back to the original pleading.

Due process considerations under Rule 15 only arise where the amendment changes the party against whom the claim was made. Staggers v. Otto Gerdau Co., Inc., 359 F.2d 292, 296 (2nd Cir. 1966). Notice and prejudice are thus non-issues because neither the claims nor the party against whom they were originally asserted were changed. Because the transactional nexus test is met, no other action was required. The amendment was therefore proper.

3. The trial court erred in granting summary judgment because the court only considered the statute of limitations defense as it applied to the claim relating to the Clark firm's negligence per se failure to meet the jurisdictional time line for appeal and not as applied to claims relating to the Clark firms' failure to advise as to the injured employee's medical status and needs.

In its sketchy findings, the trial court found the amended complaint was barred by the statute of limitations (R. 110), apparently inferring that the limitations date was October 18, 2002 (R. 43), the last day for appealing the adverse ruling of the Lawrence County Circuit Court in the underlying workers' compensation action.

In fact, both the original complaint (R. 5-7) and the amended complaint (R. 12-13), whose causes of action are identical, included allegations of negligence, breach of contract, and breach of fiduciary duty, all of which are directed toward more than a single event.

The affidavit of Joe Bridewell (R. 67-69), the third party administrator's claims handler in the underlying Workers' Compensation case, states that he was not informed of the adverse decision of the circuit court until October 17, 2002, the twenty-ninth day after the circuit court's decision. The Amended Complaint relates that the Clark firm was instructed to appeal, but failed to do so. Moreover, Mr. Bridewell states that the Clark Firm's neglect of its representation of Safety Risk Services and Comp Choice continued after it failed to appeal. It also failed to provide timely

notice to Comp Choice of Mr. Grinstead's medical needs and bills, up to the time of discharge of the defendant law firm in September of 2003.

Suit was filed on September 14, 2005, some two months before the prescriptive period expired, according to defendant's own arithmetic. The original complaint was filed not only prior to the Clark firm's allegation of the date the statute ran, but prior to three years having elapsed from the date of the circuit court's adverse decision in the underlying case. In addition, as noted above, there are allegations of negligence and breach of fiduciary duties that continue until September of 2003. This continuing tort not only expanded any potential bar date but further provides a material issue of fact. Smith v. Sneed, 636 So.2d 1252, 1256 (Miss. 1994)

The trial court's duty in summary judgment is simply to determine whether material issues of fact exist. Moreover, "The moving party has the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." Howard v. City of Biloxi, 943 So.2d 751, 754 (Miss. App. 2006) (citing City of Jackson v. Sutton, 797 So.2d 977, 979 (Miss. 2001)).

In this case, the trial court ignored plaintiff's affidavits and arbitrarily and erroneously selected October of

2002 as the date the statute of limitations against the Clark firm began to run, when it actually did not start until September of 2003.

4. 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.

Defendants' "Motion to Dismiss" was actually a summary judgment motion, with several affidavits attached. The trial court erred in converting it to such without any discovery, ignoring plaintiff's motion to compel responses.

In a summary judgment context, the Mississippi Supreme Court has repeatedly held a plaintiff-appellant is unquestionably entitled to discovery responses. Jones v. Jackson Public Schools, 767 So. 2d 730, ¶3, (Miss. 2000); Fruchter v. Lynch Oil Co., 552 So. 2d 195 (Miss. 1988); Aladdin Constr. Co. v. John Hancock Life Ins. Co., 914 So. 2d 169, 175 (2005 Miss. LEXIS, 717). These holdings are consistent with MRCP 12(b) and 12(c) which 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 motion is converted to one for summary judgment under Rule 56.

MRCP 56, by its very terms, provides for the court's examination of affidavits and other evidentiary support behind both claims and defenses to determine whether triable

issues exist, not for the litigant to be deprived of a full trial of genuine fact issues. According to the Official Comment, Rule 56 "serves as an instrument of discovery," [and] "provides the means by which a party may pierce the allegations in the pleadings and obtain relief BY INTRODUCING OUTSIDE EVIDENCE showing that there are no fact issues that need to be tried." (emphasis added)

Here, Plaintiff has both requested discovery and filed a motion to compel responses. To this date, however, both the lower court and the Defendants have failed to address these repeated attempts at fulfilling Mississippi's procedural mandates for summary judgment practice. To date, both have also failed to indicate how a converted-to summary judgment motion may "serve as an instrument of discovery" in the complete absence of discovery itself. Prior Mississippi Supreme Court holdings, MRCP 12 and 56 all provide for the allowance and consideration of evidence via the machinations of discovery. The injustice rendered by the lower court in ignoring all three must now be undone.

#### V. CONCLUSION

If Safety Risk had served the original complaint on January 10, 2006, the Clark firm would not have been able to claim that the statute of limitations was tolled. See Rule 15 and Miss. Code Ann. §11-7-13 (assignment may be brought in name of original party or name of assignee). It would,

however, have been entitled to make a motion to have the real party in interest, Comp Choice, substituted as the party plaintiff. That substitution would have related back to the date of filing of the original complaint, and again the Clark firm would have had no statute of limitations argument.

It made no sense whatsoever for the Circuit Court to hold that the amendment to the complaint before it was served on January 10 made a difference. The Clark firm got notice of the action within 120 days of the filing of the original complaint. It suffered no prejudice. In fact, judicial economy was served by the substitution of the real party in interest, and the Clark firm should not be heard to complain that it can turn that benefit into dismissal of the complaint against it.

The Circuit Court further erred in arbitrarily fixing a date that the statute of limitations ran, as well as converting a motion to dismiss into a summary judgment motion in the fact of not only filed discovery but a motion to compel responses to that this discovery.

Accordingly, the ruling of the Circuit court should be reversed and this action remanded for trial.

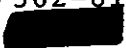
Comp Choice acknowledges that the Clark firm argued below that if there is a dispositive issue in a case - such as a prescriptive period - then all other issues are or may

be immaterial under Rule 56. As the Mississippi appellate courts have so often said, it does not matter how many facts may be disputed if there is no material issue because a decision on some more fundamental point has disposed of the case. As pointed out in the preceding sections of this brief, concluding that the three year statute of limitations had expired on all the stated claims requires accepting the specious notion that a complaint cannot be amended before it is served, that if it is amended to change the plaintiff it is somehow void as a new claim, and that the trial court may willfully ignore claims relating to facts other than the date the Clark firm omitted to file a notice of appeal. The case should be reversed.

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 Brief of Appellant to:

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SO CERTIFIED, this the 20th day of July, 2007.

  
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